Supreme Court, U.S.
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No. 85-1672

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM D. MERCHANT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED APRIL 11, 1986
CERTIORARI GRANTED JUNE 30, 1986

212pp

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D.C. No. CR 81-109-1 SW (ST)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

WILLIAM DAVIDSON MERCHANT, DEFENDANT-APPELLANT.

March 17, 1981

RELEVANT DOCKET ENTRIES

Date	Filings—Proceedings
6/7/83	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL FOR APPELLANT; COUNSEL FOR APPELLEE. ogm
6/7	Received DC Time Schedule, (not stamped filed in DC); Transcripts ordered on June 10, 1983; Reporter's transcripts due on June 17, 1983; the opening brief, excerpts of record and designation of record due on July 7, 1983; appellee's designation of record due on July 22, 1983; appellee's brief is due on July 29, 1983; the reply brief, if any, is due Aug. 12, 1983. (CRIMATT) ogm

6/20	Filed motion by Court Reporter (Vickstein) motion for extension to file transcript to July 7, 1983. (CRIMATT) ogm
6/27	Filed Order (SNEED); Court Reporter Pella's motion of June 20, 1983 for an extension of time in which to file the transcript is granted in part. The transcript is due July 18, 1983. The parties will meet this schedule: appellant's opening brief, excerpts of record, and designation of the clerk's record are due August 8, 1983; appellee's designation of the record is due August 22, 1983; appellee's brief is due August 29, 1983; the reply brief, if any, is due September 12, 1983. (pw)
7/13	Filed as of 7/7/83 Court Reporter's (William R. Johnston) motion to file transcript to August 15, 1983. lw
7/27	Filed Order (SNEED) Court Reporter William Johnston's motion for an extension of time to file the transcript is granted. The transcript is due August 15, 1983. No further extensions will be granted to the court reporter to file the transcript absent extraordinary circumstances. The clerk of the district court will promptly notify any other court reporters involved in this appeal of the due date.
8/26	REFERRED TO CRIMATT RE: LATE APPELLANT BRIEF. gb

9/6	Filed Order (SNEED) Teh [*sic*] transcript was due Aug. 15, 1983. Court reporter William Johnston will file the transcript by Sept. 9, 1983 or explain in a motion why the transcript has not been filed. The parties will meet the following time schedule: aplt's opening brief, excerpts of record, and designation of the clerk's record are due Sept. 30, 1983; aple's designation of the record is due Oct. 14, 1983; aple's brief is due Oct. 21, 1983; the reply brief, if any, is due Nov. 4, 1983.
9/30	Filed Orig & 15 Appellant's Opening brief (33 pgs) and FIVE EXCERPT OF RECORD 9/29 EM
9/30	R'cvd courtesy copy of aplt's designation of clk's record. ogm
10/27	Filed Government's motion for ext. of time in which to file its brief. 10/26 ot (CRIMATT)
11/15	Filed Order (SNEED) Aple's motion of Oct. 27, 1983 for an ext. of time in which to file its brief is granted. Aple's brief is due Nov. 21, 1983. The reply brief, if any, is due Dec. 05, 1983. A further motion for ext. of time from aple will be viewed with disfavor. ot
11/18	Recv'd as of Nov. 10, 1983, CERTIFICATE OF RECORD (11/8/83) referred to CRIMATT: late R/T's) lw
11/22	Recv'd Orig & 15 aple's brief (27 pgs) (Cert. of Record not yet filed.) lw
11/30	Filed aplt's motion to ext. time to file its reply brief. 11/29 (CRIMATT) eal

12/13	Filed Order (SNEED) the Certificate of Record, received Nov. 18, 1983, is ordered filed. Appellee's brief received November 22, 1983, is also ordered filed. ogm
12/13	FILED CERTIFICATE OF RECORD PREVIOUSLY RECEIVED. ogm
12/13	Filed Orig & 15 appellee's briefs already received. ogm
12/13	Filed Order (SNEED) aplt's motion of Nov. 30, 1983 for an extension of time to file the reply brief is granted in part. The reply brief is due Dec. 23, 1983. ogm
12/27	Filed as of 12/23/83, Orig & 15 Aplt's reply briefs. (21 pgs) 12/23 ogm
12/27	Filed as of 12/23/83, Aplt's motion to augment the record on appeal. (CRIMATT) 12/23 ogm
1984	
1/12/84	Filed Order (SNEED) aplt's motion to augment the record is denied. Aplt may lodge the supplemental report and petition date 4/30/81 with the clerk of this Court. The panel that hears this case on the merits may give these materials such consideration as it deems appropriate. ogm
1/23	Lodged one envelope of aplt's exhibits pursuant to 1/12/84 order. (Case File) lw
5/7	Ltr sent to aple re: failure to desig. clerk's record. EM
5/21	Recvd aple's response to ltr of 5/7/83; re: desig. record on 5/17/84. EM
6/15	ARGUED & SUBMITTED BEFORE: MERRILL, FLETCHER & CANBY, CJJ sz

6/15	Lodged aplt's condition of probation, (exhibit). PANEL sz
6/15	Recvd as of June 14 letter date June 14, from (J.F. Penrose, counsel for aple) re: additional citations. (6/14)(Panel) tsp
6/28	Filed Order (MERRILL, FLETCHER & CANBY, CJJ) The materials and exhibits lodged with the court in connection with aplt's motion to augment the record on appeal are hereby ordered filed. eal
6/28	Filed one envelope of aplt's exhibits previously recv'd. eal
7/5	FILED AS OF 12/13/83, CERT. TRANSC. OF RECORD ON APPEAL IN FIVE VOLUMES: VOLS. I-II, PLDGS (Orig.); VOLS. III-V R/T's (Orig). EM
5/14/85	ORDERED OPINION (FLETCHER) FILED AND JUDGMENT TO BE FILED AND ENTERED.
5/14	FILED OPINION—REVERSED.
5/14	FILED AND ENTERED JUDGMENT. EM
5/20	Filed motion & order (Dep. Clk) granting aple USA ext. of time to file petition for rehearing and suggestion for rehearing en banc to and including June 27, 1985. (5/17) EM
6/26	Filed aple's (USA) Petition for Rehearing with Suggestion for Rehearing En Banc. (15 pgs) 6/25 PANEL & ACTIVE JUDGES. EM
7/17	Recvd ltr from aple (USA) dtd 7/15, re: addtl authorities. 7/15 Panel & Active Judges. EM

7/26	Filed Order (MERRILL, FLETCHER & CANBY) Appellant is directed to file a response to appellee's petition for rehearing. The response shall be filed within fourteen (14) days from the date of this order and shall not exceed fifteen (15) pages in length. (7/26) cmk
7/31	Filed aplt's motion for ext of time to file opposition to petition for rehearing. 7/31 PANEL EM
8/8	Filed Order (MERRILL, FLETCHER & CANBY) Appellant's request for an extension in which to file a response to the Government's petition for rehearing is granted. The response shall be filed on or before Sept. 6, 1985. (8/7) cmk
9/9	Filed aplt's response to government's petition for rehearing and to suggestion for rehearing en banc. 09/06 (Panel only, insufficient copies) -ot-
9/12	Rec'd 33 addtl copies of aplt's response to government's petition for rehearing, which was filed on 09/90/85. (All Active Judges) -ot-
10/1	Rec'd aple's addtl citations of authority. 09/27 (Panel) -ot-
12/3	Recvd ltr dtd 12/2 from aple re: additional citations. (Panel) tsp
1/13/86	Filed Order (MERRILL, FLETCHER & CANBY) The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. 1/13 cmk
1/22	MANDATE ISSUED
2/6	Filed aple's motion to recall mandate and for 30 day stay of mandate. 2/6 (FLETCHER) -ot-

3/27	Rec'd letter dated 3/26/86, from Svetcov, AUSA, re: the filing of the cert. and his motion to recall the mandate. 3/26 (FLETCHER) -ot-
4/16	Filed Order (MERRILL, FLETCHER & CANBY) Appellee's motion to recall mandate and for thirty day stay of mandate pending application for certiorari is hereby granted. 4/16 cmk
5/12	Rec'd SC notice of filing petition for certiorari on 4/11/86. #85-1672 -ot-
7/10	Filed as of 7/7, cert. copy of SC order of June 30, 1986 granting certiorari #85-1672 -ot- (P)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. CR 81-00109-01

UNITED STATES OF AMERICA

v.

WILLIAM D. MERCHANT

Judge: JUDGE WILLIAMS
Defendant:
D1 MERCHANT, WILLIAM D

Dft ID: -3553

Defendant terminated: 5/18/83

Terminated counts:
MANUFACTURE PHENCYCLIDINE HCL (PCP), 21:841(A)(1)(S1)

MANUFACTURE OF PHENCYCLIDINE, 21:841(a)(1) & 21:841(B)(1)(B) (1-2), POSSESSION OF PIPERIDINE, 21:841(D) (3), POSSESS PIPERIDINOCYCLOHEXANECARBONITRILE (PCC), 21:841(A)(1) (S2), POSSESS-PIPERIDINOCYCLOHEXANECARBONITRILE W/INTENT TO MANUFACTURE PHENCYCLIDINE HCL, 21:841(D) (S3)

Offense Level (disposition): FEL

Total Jail: 120 Mo Total Fine: $25,000.00

Complaints:

Fld mas complaint 03/17/81 (CONSPIRING TO POSSESS WITH INTENT TO MANUFACTURE & DISTRIBUTE PHENCYCLIDINE).

Disposition

(Count S1) COUNT S1, 10 YEARS JAIL, 7 YEARS SPECIAL PAROLE, $25,000 FINE, CONTACT PROBATION OFFICE 1ST & 15TH OF EACH MONTH (05/18/83) (Counts 1-3, S2-S3) Dismissed. 05/18/83

RELEVANT DOCKET ENTRIES

Date	NR	Filing – Proceedings
03/17/81	1	Filed magistrate complaint (MAGISTRATE BLACKER) (Dkt'd 04/09/81).
		Defendant arrested (Dkt'd 04/09/81).
03/18/81	2	Minute sheet filed (UNREPORTED) (MAGISTRATE BLACKER) (Dkt'd 04/09/81).
		Defendant's first appearance (Dkt'd 04/09/81).
		Bail hearings held (BAIL, $250,000.) (Dkt'd 04/09/81).
		Bail hearings continued to 03/19/81 @ 9:30 AM (MAGISTRATE BLACKER) (Dkt'd 04/09/81).
		Preliminary examination set for 03/19/81 @ 9:30 AM (MAGISTRATE BLACKER) (Dkt'd 04/09/81).

03/19/81	3	Minute sheet filed (UNREPORTED) (MAGISTRATE BLACKER) (Dkt'd 04/09/81).
		Bail hearing continued to 03/26/81 @ 9:30 AM (MAGISTRATE BLACKER) (Dkt'd 04/09/81).
		Preliminary examination continued to 03/26/81 @ 9:30 AM (MAGISTRATE BLACKER) (Dkt'd 04/09/81).
		Attorney STEPANIAN, MICHAEL added to case (Dkt'd 04/09/81).
03/25/81	4	Field indictment (Dkt'd 04/09/81).
		Case assigned to JUDGE WILLIAMS (Dkt'd 04/15/81).
03/26/81	5	Minute sheet filed (UNREPORTED) (MAGISTRATE BLACKER) (Dkt'd 04/09/81).
		Arraignment held (Counts 1-3) (Dkt'd 04/09/81).
		Defendant enters plea of not guilty (Counts 1-3) (MAGISTRATE BLACKER) (Dkt'd 04/09/81).
		Bail hearing held (BAIL TO REMAIN AT $250,000.) (Dkt'd 04/09/81).
		Hearing on pre-trial motions set for 04/15/81 @ 2:00 PM (Counts 1-3) (JUDGE WILLIAMS) (Dkt'd 04/09/81).
		Trial date set for 05/04/81 @ 9:30 AM (Counts 1-3) (JUDGE WILLIAMS) (Dkt'd 04/09/81).
04/09/81	6	Minute sheet filed (UNREPORTED) (MAGISTRATE BLACKER) (Dkt'd 04/15/81).

		Bail hearing held (PROPERTY TO BE POSTED IN AMOUNT OF $250,000.) (MAGISTRATE BLACKER) (Dkt'd 04/15/81).
04/15/81	13	Minute sheet filed (C/R JOHNSTON, BILL) (JUDGE WILLIAMS) (Dkt'd 05/07/81).
		Hearing on pre-trial motions continued to 05/20/81 @ 2:00 PM (Counts 1-3) (JUDGE WILLIAMS) (Dkt'd 05/07/81).
		Trial date set for 06/08/81 @ 9:30 AM (Counts 1-3) (JUDGE WILLIAMS) (Dkt'd 05/07/81).
04/16/81	14	Minute sheet filed (MAGISTRATE BLACKER) (Dkt'd 05/07/81).
		Bail hearing held (BAIL, $500,000 WITH CONDITIONS, SEE ORDER) (MAGISTRATE BLACKER) (Dkt'd 05/07/81).
	15	DEFENDANT MERCHANT'S RESPONSE IN OPPOSITION TO GOVERNMENT'S MOTION FOR REVIEW OF BAIL (Dkt'd 05/07/81).
	16	DECLARATION OF MICHAEL STEPANIAN IN RESPONSE TO GOVERNMENT'S MOTION FOR REVIEW OF BAIL (Dkt'd 05/07/81).
04/22/81	17	Criminal property bond in the amount of $500,000.00 (SPECIAL CONDITIONS, SEE APPEARANCE BOND DATE OF APPEARANCE, 5-20-81 AT 2:00 P.M.) (MAGISTRATE BLACKER) (Dkt'd 05/07/81).

05/14/81 18 Motion for discovery/inspection filed (MOT#2) (Counts 1-3) (Dkt'd 05/26/81).

18 Mark the beginning of a potential excludable period of type X-E starting on 05/14/81 and not to extend beyond 05/20/81 ((In re MOTFDI on 5/14/81)) (Dkt'd 05/26/81).

Motion for discovery/inspection hearing set for 05/20/81 @ 2:00 AM (MOT#2) (JUDGE WILLIAMS) (Dkt'd 05/26/81).

19 Memorandum in support of motion for discovery/inspection (MOT #2) (Dkt'd 05/26/81).

20 Motion filed (MOT#3) (MOTION FOR DISCLOSURE OF INFORMANT) (Dkt'd 05/26/81).

Motion hearing set for 05/20/81 @ 2:00 AM (MOT#3) (JUDGE WILLIAMS) (Dkt'd 05/26/81).

21 Memorandum in support of motion. (MOT#3) (Dkt'd 05/26/81).

Mark the beginning of a potential excludable period of type X-E starting on 05/14/81 and not to extend beyond 05/20/81 ((In re MOTFOD on 5/14/81)) (Dkt'd 05/26/81).

22 Motion to suppress evidence filed (MOT#4) (Counts 1-3) (Dkt'd 05/26/81).

22 Mark the beginning of a potential excludable period of type X-E starting on 05/14/81 and not to extend beyond 05/20/81 ((In re MOTFSE on 5/14/81)) (Dkt'd 05/26/81).

Motion to suppress evidence hearing set for 05/20/81 (MOT#4) (JUDGE WILLIAMS) (Dkt'd 05/26/81).

23 Memorandum in support of motion to suppress evidence (MOT#4) (Dkt'd 05/26/81).

05/19/81 24 Motion for continuance filed (MOT#5) (Dkt'd 05/27/81).

Motion for continuance granted (MOT#5) (JUDGE WILLIAMS) (Dkt'd 05/27/81).

25 Order filed (ORDER GRANTING CONTINUANCE MOTION) (JUDGE WILLIAMS) (Dkt'd 05/27/81).

06/16/81 26 Memorandum in opposition to motion for discovery/inspection (MOT#2) (Dkt'd 06/17/81).

27 Filed answer to motion for discovery/ inspection (MOT#2) (Dkt'd 06/17/81).

28 Filed answer to motion to suppress evidence (MOT#4) (Dkt'd 06/17/81).

29 Memorandum in opposition to motion to suppress evidence (MOT#4) (Dkt'd 06/17/81).

30 Answer to motion (MOT#3) (" ") (Dkt'd 06/17/81).

31 Memorandum in opposition to motion (MOT#3) (Dkt'd 06/17/81).

32 Motion to dismiss filed (MOT#6) (Counts 1-3) (JURY CHALLENGE) (Dkt'd 06/23/81).

32 Mark the beginning of a potential excludable period of type X-E starting on 06/16/81 ((In re MOTFDC on 6/16/81)) (Dkt'd 06/23/81).

		Motion to dismiss hearing set for 08/19/81 @ 2:00 PM (MOT#6) (JUDGE WILLIAMS) (Dkt'd 06/23/81).
		Memorandum in support of motion to dismiss (MOT#6) (Dkt'd 06/23/81).
	34	Memorandum in support of motion to dismiss (MOT#6) (Dkt'd 06/23/81).
	35	CERTIFICATE OF MAILING OF MOTION (Dkt'd 06/23/81).
06/17/81	36	Superseding indictment (Dkt'd 06/23/81).
06/18/81	37	Motion for continuance filed (MOT#7) (AND FOR EXCLUDABLE DELAY) (Dkt'd 06/23/81).
	38	Order filed (RE:CONTINUANCE AND EXCLUDABLE ENTRY) (JUDGE WILLIAMS) (Dkt'd 06/23/81).
		Hearing on pre-trial motions set for 08/19/81 (Counts 1-3) (JUDGE WILLIAMS) (Dkt'd 06/23/81).
		Excludable delay based on finding the ends of justice served by continuance began on 05/19/81 and ended on 08/19/81 (JUDGE WILLIAMS) (Dkt'd 06/23/81).
07/17/81	39	Answer to motion to dismiss (MOT#6) (JURY CHALLENGE) (Dkt'd 07/22/81).
08/19/81	40	Minute sheet filed (REPORTER S. DAINS) (JUDGE WILLIAMS) (Dkt'd 08/26/81).
		Motion to suppress evidence hearing held (MOT#4) (JUDGE WILLIAMS) (Dkt'd 08/26/81).
		Motion for discovery/inspection hearing held (MOT#2) (JUDGE WILLIAMS) (Dkt'd 08/26/81).

08/27/81	42	Answer to motion to dismiss (MOT#6) (JUDGE WILLIAMS) (Dkt'd 08/31/81).
09/01/81		Motion for continuance filed (MOT#9) (MOTION FOR CONTINUANCE OF PRETRAIL HEARING DATE AND REQUEST FOR EXCLUDABLE TIME) (JUDGE WILLIAMS) (Dkt'd 09/09/81).
	44	Order filed (RE EXCLUDABLE DELAY) (JUDGE WILLIAMS) (Dkt'd 09/09/81).
		Motion for continuance granted (MOT#9) (JUDGE WILLIAMS) (Dkt'd 09/09/81).
		Excludable delay based on finding the ends of justice served by continuance began on 09/02/81 and ended on 10/20/81 (JUDGE WILLIAMS) (Dkt'd 09/09/81).
09/08/81	43	Motion by government filed (MOT#8) (TO DESTROY EVIDENCE) (JUDGE WILLIAMS) (Dkt'd 09/09/81).
09/11/81		Motion for discovery/inspection granted (MOT#2) (JUDGE WILLIAMS) (Dkt'd 09/18/81).
	45	Order filed (JUDGE WILLIAMS) (Dkt'd 09/18/81).
09/18/81	46	Order filed (JUDGE WILLIAMS) (Dkt'd 09/23/81).
		Motion by government granted (MOT#8) (TO DESTROY EVIDENCE) (JUDGE WILLIAMS) (Dkt'd 11/02/81).
10/20/81	48	Minute sheet filed (REPORTER: WM. JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 10/22/81).

Motion to suppress evidence hearing held (MOT#4) (JUDGE WILLIAMS) (Dkt'd 10/22/81).

Excludable delay due to hearings on Pretrial Motions began on 05/14/81 and ended on 10/20/81 (Dkt'd 10/22/81).

Motion to suppress evidence taken under advisement (MOT#4) (JUDGE WILLIAMS) (Dkt'd 10/22/81).

Mark the beginning of a potential excludable period of type X-G starting on 10/20/81 and not to extend beyond 11/19/81 ((In re MOTADVSE on 10/20/81)) (Dkt'd 10/22/81).

10/21/81 47 Filed transcript of proceedings for 04/16/81 (Dkt'd 10/21/81).

10/28/81 49 Order filed (ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS) (JUDGE WILLIAMS) (Dkt'd 11/10/81).

Motion to suppress evidence denied (MOT#4) (Dkt'd 11/10/81).

Excludable delay while defendant motion under advisement, began on 10/20/81 and ended on 10/28/81 (Dkt'd 11/10/81).

11/02/81 50 Order filed (ORDER DENYING MOTION TO DISMISS INDICTMENT STAY PROCEEDINGS AND TO GRANT DISCOVERY) (JUDGE WILLIAMS) (Dkt'd 11/10/81).

Motion to dismiss hearing held (MOT#6) (Dkt'd 11/10/81).

Motion to dismiss denied (MOT#6) (JUDGE WILLIAMS) (Dkt'd 11/10/81).

		Excludable delay due to hearings on Pretrial Motions began on 06/16/81 and ended on 11/02/81 (Dkt'd 11/10/81).
03/09/82	52	Notice filed (TO SET FOR TR, HEARING SET FOR 4/21/82 @ 10:00 A) (JUDGE WILLIAMS) (Dkt'd 03/24/82).
04/22/82	53	Minute sheet filed (REPORTER JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 04/27/82).
		Trial date set for 06/28/82 @ 10:00 AM (Counts 1-3, S1-S3) (JURY TO BE WAIVED AT TRIAL.) (JUDGE WILLIAMS) (Dkt'd 06/02/83).
05/11/82	55	Notice filed (OF RELATED CASE.) (JUDGE WILLIAMS) (Dkt'd 05/13/82).
05/27/82	56	Minute sheet filed (REPORTER DAINS) (JUDGE WILLIAMS) (Dkt'd 06/02/82).
		US Attorney WARD, GREGORY H added to case (Dkt'd 06/02/82).
		Motion to suppress evidence (MOT#4) reopened (JUDGE WILLIAMS) (Dkt'd 06/02/82).
		Motion to suppress evidence hearing set for 07/14/82 @ 10:00 AM (MOT#4) (JUDGE WILLIAMS) (Dkt'd 06/02/82).
		Excludable delay based on finding the ends of justice served by continuance began on 05/26/82 and ended on 07/14/82 (JUDGE WILLIAMS) (Dkt'd 06/02/82).

06/15/82 58 Order filed (THE TIME BETWEEN 5-26-82 UNTIL 6-18-82, IS EXCLUDED UNDER THE SPEEDY TRIAL ACT PURSUANT TO 18 USC 3161(H)(8)) (JUDGE WILLIAMS) (Dkt'd 06/18/82).

Mark the beginning of a potential excludable period of type X-T starting on 05/26/82 and not to extend beyond 06/18/82 ((In re ORD on 6-15-82)) (JUDGE WILLIAMS) (Dkt'd 06/18/82).

06/16/82 59 Order filed (ALL MOTION FILING AND HEARING DATES SHALL BE VACATED. THE FOLLOWING DATES WILL BE IN EFFECT: 6-25-82 DEF'S FILE MOTION 7-14-82 GOV'T RESPONSE 7-21-82 HEARING AT 10:00 IN SF.) (JUDGE WILLIAMS) (Dkt'd 06/18/82).

Motion to suppress evidence filed (MOT#10) (Counts 1-3, S1-S3) (JUDGE WILLIAMS) (Dkt'd 06/18/82).

Mark the beginning of a potential excludable period of type X-E starting on 06/16/82 ((In re MOTFSE on 6-16-82)) (JUDGE WILLIAMS) (Dkt'd 06/18/82).

60 Motion to suppress evidence filed (MOT#11) (Counts 1-3, S1-S3) (MOTION TO CONTINUE FILING AND HEARING DATES FOR MOTION TO RECONSIDER DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.) (JUDGE WILLIAMS) (Dkt'd 06/18/82).

	61	DECLARATION OF CRISTINA C. ARGUEDAS RE MOTION TO CONTINUE FILING AND HEARING DATES FOR DEFENDANT'S MOTION FOR RECONSIDERATION. (JUDGE WILLIAMS) (Dkt'd 06/18/82).
06/23/82	62	Motion filed (MOT#12) (TO SUBSTITUTE ATTORNEY OF RECORD.) (JUDGE WILLIAMS) (Dkt'd 06/24/82).
		Motion granted (MOT#12) (TO SUBSTITUTE ATTORNEY OF RECORD) (JUDGE WILLIAMS) (Dkt'd 06/24/82).
		Filed substitution of COOPER, PENELOPE M. as attorney for defendant (JUDGE WILLIAMS) (Dkt'd 06/24/82).
06/28/82	64	Notice filed (MOTION FOR RECONSIDERATION OF DEFENDANT'S MOTION TO SUPPRESS.) (JUDGE WILLIAMS) (Dkt'd 07/01/82).
		Motion to suppress evidence hearing set for 07/21/82 @ 10:00 AM (MOT#11) (JUDGE WILLIAMS) (Dkt'd 07/01/82).
	65	Order filed (ALL MOTION FILING AND HEARING DATES IN THE ABOVE CASE SHALL BE VACATED AND THE FOLLOWING DATES WILL BE IN EFFECT, 6-25-82—DEFENDANT'S FILE MOTION, 7-14-82—GOV'T RESPONSE, 7-21,82—HEARING AT 10:00 IN SF.) (JUDGE WILLIAMS) (Dkt'd 07/01/82).

07/14/82	66	Motion by government filed (MOT#14) (RE EXTENSION OF TIME TO RESPOND TO MOTION FOR RECONSIDERATION OF MOTION TO SUPPRESS FROM 7/14 TO 7/21/82 DECLARATION OF J. PENROSE) (Dkt'd 07/16/82).
08/20/82	67	Notice filed (CLERK'S NOTICE TO COUNSEL RE HEARING SET) (Dkt'd 08/24/82).
		Motion to suppress evidence hearing reset to 09/08/82 @ 10:00 AM (MOT#11) (IN SAN FRANCISCO) (JUDGE WILLIAMS) (Dkt'd 08/24/82).
08/27/82	68	Answer to motion to suppress evidence (MOT#11) (Dkt'd 08/31/82).
09/07/82	69	Reply to answer to motion to suppress evidence (MOT#11) (Dkt'd 09/09/82).
09/08/82	70	Minute sheet filed (C/R-JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 09/14/82).
		Motion to suppress evidence hearing held (MOT#11) (JUDGE WILLIAMS) (Dkt'd 09/14/82).
		Motion to suppress evidence denied (MOT#11) (JUDGE WILLIAMS) (Dkt'd 09/14/82).
		Excludable delay due to hearings on Pretrial Motions began on 06/16/82 and ended on 09/08/82 (Dkt'd 09/14/82).
		Excludable delay based on finding the ends of justice served by continuance began on 05/26/82 and ended on 06/18/82 (Dkt'd 09/14/82).
		Hearings set to 09/22/82 @ 11:00 AM (IN SAN FRANCISCO) (JUDGE WILLIAMS) (Dkt'd 09/14/82).

09/23/82 72 Minute sheet filed (C/R-JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 09/24/82).

09/24/82 —TRIAL DATE NOT SET, DEF TO NOTICE MOTION (JUDGE WILLIAMS) Dkt'd 09/24/82).

Excludable delay due to hearings on Pretrial Motions began on 05/14/81 and ended on 09/11/81 (Dkt'd 09/27/82).

10/08/82 74 Motion filed (MOT#15) (RE: EXONERATION OF PORTION OF PROPERTY POSTED AS SECURITY) (Dkt'd 10/14/82).

Motion hearing set for 10/18/82 @ 10:00 AM (MOT#15) (JUDGE WILLIAMS) (Dkt'd 10/14/82).

Mark the beginning of a potential excludable period of type X-E starting on 10/08/82 ((In re MOTFOD on 10-8-82)) (Dkt'd 10/14/82).

75 Memorandum in support of motion (MOT#15) (Dkt'd 10/14/82).

76 —(MOT#15) (DECLARATION OF C. ARGUEDAS) (Dkt'd 10/14/82).

77 —PROOF OF SERVICE RE MOTIONS FILED THIS DAY (Dkt'd 10/14/82).

10/18/82 78 Order filed (EXONERATING PART OF BOND) (JUDGE WILLIAMS) (Dkt'd 10/20/82).

Bond exonerated (EXONERATING PROPERTY POSTED BY PAUL & KATHY KELLEY, LOCATED AT 235 JONES ROAD, LOS GATOS, CA) (JUDGE WILLIAMS) (Dkt'd 10/20/82).

	79	Minute sheet filed (C/R-JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 10/20/82).
		Bail hearing held (JUDGE WILLIAMS) (Dkt'd 10/20/82).
		Mark the beginning of a potential excludable period of type X-E starting on 10/18/82 ((In re BNDHRGH on 10-18-82)) (Dkt'd 10/20/82).
		Excludable delay due to hearings on Pretrial Motions began on 10/18/82 and ended on 10/18/82 (Dkt'd 10/20/82).
10/22/82	81	Order filed (PERMITTING TRAVEL TO SOUTHERN DISTRICT OF CA) (JUDGE WEIGEL) (Dkt'd 10/25/82).
11/16/82	82	Notice filed (EVIDENTIARY HEARING ON MOTION TO SUPPRESS SET FOR 12-13-82 @ 10AM) (JUDGE WILLIAMS) (Dkt'd 11/23/82).
		Motion to suppress evidence hearing set for 12/13/82 @ 10:00 AM (MOT#10) (RE: EVIDENTIARY HEARING ON MOTION) (JUDGE WILLIAMS) (Dkt'd 11/23/82).
12/13/82	83	Minute sheet filed (C/R-JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 12/20/82).
		Motion to suppress evidence hearing reset to 01/12/83 @ 2:00 PM (MOT#10) (JUDGE WILLIAMS) (Dkt'd 12/20/82).
		Mark the beginning of a potential excludable period of type X-A starting on 12/13/82 and not to extend beyond 01/12/83 ((In re MINSHTF on 12-13-82)) (Dkt'd 12/20/82).

01/12/83	85	Minute sheet filed (C/R-VIVIAN PELLA) (JUDGE WILLIAMS) (Dkt'd 01/17/83).
		Motion by government hearing held (MOT#14) (JUDGE WILLIAMS) (Dkt'd 01/17/83).
		Motion by government granted (MOT#14) (JUDGE WILLIAMS) (Dkt'd 01/17/83).
		Motion to suppress evidence hearing held (MOT#4) (JUDGE WILLIAMS) (Dkt'd 01/17/83).
		Motion to suppress evidence hearing held (MOT#10) (JUDGE WILLIAMS) (Dkt'd 01/17/83).
		Motion to suppress evidence denied (MOT#10) (JUDGE WILLIAMS) (Dkt'd 01/17/83).
		Motion to suppress evidence denied (MOT#4) (JUDGE WILLIAMS) (Dkt'd 01/17/83).
		Trial date set for 03/17/83 @ 10:00 AM (Counts 1-3, S1-S3) (JUDGE WILLIAMS) (Dkt'd 01/17/83).
03/17/83	87	Stipulation between the government and defendant (FACTS RE: STIPULATED FACTS TRIAL) (JUDGE WILLIAMS) (Dkt'd 03/18/83).
	88	Minute sheet filed (C/R-JOHNSTON STIPULATION OF FACTS TENDERED RE: TRIAL) (JUDGE WILLIAMS) (Dkt'd 03/18/83).
		Trial begins-bench (Count S1) (C/R-JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 06/02/83).

		Trial held-bench (Count S1) (STIPULATED FACTS TRIAL) (JUDGE WILLIAMS) (Dkt'd 06/02/83).
		Bench trial taken under advisement (Count S1) (RE STIPULATED FACTS) (JUDGE WILLIAMS) (Dkt'd 06/02/83).
		Hearing set to 03/23/83 @ 3:00 PM (RE FINDING OF COURT FOR STIPULATED FACTS TRIAL) (JUDGE WILLIAMS) (Dkt'd 03/25/83).
03/23/83	90	Stipulation Filed (STIPULATED FACTS BETWEEN DEFENDANT AND GOVERNMENT.) (JUDGE WILLIAMS) (Dkt'd 03/24/83).
	91	Minute sheet filed (C/R-LINDA LEWIS) (JUDGE WILLIAMS) (Dkt'd 03/30/83).
		Trial held-bench (Count S1) (JUDGE WILLIAMS) (Dkt'd 06/02/83).
		Trial ends-bench (Count S1) (JUDGE WILLIAMS) (Dkt'd 06/02/83).
		Court judgment of guilty (Count S1) (JUDGE WILLIAMS) (Dkt'd 06/02/83).
		Sentencing set for 05/18/83 @ 3:00 PM (Count S1) (JUDGE WILLIAMS) (Dkt'd 06/02/83).
03/28/83	94	Filed transcript of proceedings for 05/21/81 (Dkt'd 03/31/83).
05/18/83	96	Minute sheet filed (C/R BONNIE CHUFAR) (JUDGE WILLIAMS) (Dkt'd 05/26/83).

Sentencing of defendant (Count S1) (COUNT S1, 10 YEARS JAIL, 7 YEARS SPECIAL PAROLE, $25,000 FINE, CONTACT PROBATION OFFICE 1ST & 15TH OF EACH MONTH) (JUDGE WILLIAMS) (Dkt'd 06/30/83).

Excludable delay due to hearings on Pretrial Motions began on 05/14/81 and ended on 05/20/81 (Dkt'd 06/03/83).

Excludable delay due to hearings on Pretrial Motions began on 10/08/82 and ended on 05/18/83 (Dkt'd 06/03/83).

Excludable delay resulting from psychiatric/physical competency examination began on 12/13/82 and ended on 01/12/83 (Dkt'd 06/03/83).

Motion made in open court to dismiss (MOT#17) (Counts 1-3, S2-S3) (REMAINING COUNTS) (JUDGE WILLIAMS) (Dkt'd 06/03/83).

Motion to dismiss hearing held (MOT#17) (JUDGE WILLIAMS) (Dkt'd 06/03/83).

Motion to dismiss granted (MOT#17) (JUDGE WILLIAMS) (Dkt'd 06/03/83).

Dismissed (Counts 1-3, S2-S3) (JUDGE WILLIAMS) (Dkt'd 06/03/83).

Order filed (EXECUTION OF SENTENCE STAYED UNTIL FURTHER ORDER OF COURT) (JUDGE WILLIAMS) (Dkt'd 06/03/83).

05/19/83 97 Order filed (JUDGSTATING SENTENCE AS TO INCORRECT COUNT) (JUDGE WILLIAMS) (Dkt'd 06/03/83).

05/20/83	98	Issued judgment and commitment to U.S. Marshal (Count S1) (EXECUTION OF SENTENCE IS STAYED UNTIL FURTHER ORDER OF COURT) (JUDGE WILLIAMS) (Dkt'd 06/03/83).
5/27/83	99	Filed notice of appeal (Count S1) (APPL#1) (FEE PAID) (Dkt'd 06/03/83).
06/02/83	100	Order filed (BAIL PRESENTLY PENDING BE TRANSFERRED TO BAIL PENDING APPEAL, SUBJECT TO REVIEW 6/15/83) (JUDGE WILLIAMS) (Dkt'd 06/07/83).
06/03/83		Notice of appeal and docket entries transmitted to USCA (APPL#1) (COPIES MAILED TO PARTIES OF RECORD) (Dkt'd 06/03/83).
06/06/83	101	—(APPL#1) (SCHED: TRANSCRIPTS ORDERED BY 6/10, TRANSCRIPTS FILED BY 6/17, APPELLANT BRIEF BY 7/8, APPELLEE DESIGNATION BY 7/22, APPELLEE BRIEF BY 7/29, REPLY BY 8/12/83) (Dkt'd 06/07/83).
06/10/83	102	Transcript ordered (TRANSCRIPTS ORDERED FOR THE APPEAL) (Dkt'd 06/15/83).
06/15/83	103	Minute sheet filed (C/R-BOESEN) (JUDGE WILLIAMS) (Dkt'd 06/21/83).
		Bail hearing reset to 06/22/83 @ 10:00 AM (IN SAN FRANCISCO) (JUDGE WILLIAMS) (Dkt'd 06/21/83).

06/16/83		—(APPL#1) (USCA #83-1135) (Dkt'd 06/16/83).
06/22/83	104	Minute sheet filed (C/R-JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 06/27/83).
		Bail hearing held (JUDGE WILLIAMS) (Dkt'd 06/27/83).
		Bail hearing continued to 07/06/83 @ 10:00 AM (FOR FURTHER REVIEW) (JUDGE WILLIAMS) (Dkt'd 06/27/83).
06/29/83	105	—(APPL#1) (R/T FILED BY 7/18, APPELLANT DESIGNATION BY 8/8, APPELLEE DESIGNATION BY 8/22, APPELLEE BRIEF BY 8/29, REPLY BY 9/12) (Dkt'd 06/30/83).
07/06/83	106	Minute sheet filed (C/R-JOHNSTON) (JUDGE WILLIAMS) (Dkt'd 07/13/83).
		Bail hearing held (JUDGE WILLIAMS) (Dkt'd 07/13/83).
		Bail hearing continued to 07/13/83 @ 10:00 AM (IN SAN FRANCISCO (JUDGE WILLIAMS) (Dkt'd 07/13/83).
07/13/83	107	Minute sheet filed (C/R-SCHILLER) (JUDGE WILLIAMS) (Dkt'd 07/19/83).
		Bail hearing held (BOND APPROVED) (JUDGE WILLIAMS) (Dkt'd 07/19/83).
07/18/83	108	Filed transcript of proceedings for 01/12/83 (Dkt'd 07/19/83).
07/28/83	109	—(APPL#1) (USCA ORDER EXTENDING TIME TO FILE TRANSCRIPTS UNTIL 8/15/83) (Dkt'd 07/28/83).

09/07/83 110 —(APPL#1) (TRANSCRIPT TO BE FILED BY 9/9/83. DESIGNATION DUE 9/30/83, APPELLEE'S DESIGNATION DUE 10/14/83, APPELLEE'S BRIEF DUE 10/21/83, REPLY BRIEF DUE 11/4/83.) (Dkt'd 09/08/83).

09/08/83 111 Order filed (FOR ISSUANCE OF WARRANT FOR FAILURE TO MEET CONDITIONS OF BAIL.) (JUDGE WILLIAMS) (Dkt'd 09/15/83).

Bench warrant issued (JUDGE WILLIAMS) (Dkt'd 09/15/83).

09/16/83 112 Magistrate's criminal minutes filed. (NOT REPORTED) (MAGISTRATE LANGFORD) (Dkt'd 09/19/83).

Motion made in open court for bail pending appeal (MOT#18) (MAGISTRATE LANGFORD) (Dkt'd 09/19/83).

Motion for bail pending appeal granted (MOT#18) (DFT TO REPORT TO PROBATION OFFICE IN SJ) (MAGISTRATE LANGFORD) (Dkt'd 09/19/83).

114 Order filed (RELEASING DFT FROM CUSTODY) (MAGISTRATE LANGFORD) (Dkt'd 09/22/83).

09/20/83 113 Bench warrant returned executed, executed on 09/16/83 (Dkt'd 09/20/83).

09/23/83 115 Order filed (ALLOWING TRAVEL TO EASTERN DIST CA 9/16 AND 18/83—PROVIDED MAG LANGFORD RELEASES DFT FOLLOWING HEARING ON CURRENT VIOLATION) (JUDGE WILLIAMS) (Dkt'd 09/28/83).

	116	Filed transcript of proceedings for 09/08/82 (Dkt'd 10/04/83).
10/03/83	117	Filed designation for record on appeal (APPELLANT'S) (Dkt'd 10/07/83).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CR NO. 81-0109SW (SJ)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

WILLIAM D. MERCHANT AND CLEO L. MAROHN,
DEFENDANTS.

VIOLATIONS: 21 USC § 841(a)(1) and § 841(b)(1)(B)(5)—Manufacturing of Phencyclidine; 21 USC § 841(d)—Possession of Piperidine; 18 USC § 4—Misprison of Felonies

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SUPERSEDING INDICTMENT

COUNT ONE: (21 USC § 841(a)(1) and § 841(b)(1)(B)(5))

The Grand Jury charges: THAT

From in or about August, 1978, up to and including on or about March 3, 1981, at Los Gatos, County of Santa Cruz, Northern District of California,

WILLIAM D. MERCHANT AND
CLEO L. MAROHN,

defendants, did knowingly and willfully manufacture phencyclidine (PCP), a Schedule II controlled substance.

COUNT TWO: (21 USC § 841(a)(I) and § 841(b)(1)(B)(5))

The Grand Jury further charges: THAT

On or about March 3, 1981, at Los Gatos, County of Santa Cruz, Northern District of California,

WILLIAM D. MERCHANT AND
CLEO L. MAROHN,

defendants, did knowingly and willfully possess approximately 90 pounds of piperidinocyclohexanecarbonitrile (PCC), a Schedule II controlled substance, with intent to manufacture phencyclidine.

COUNT THREE: (21 USC § 841(d))

The Grand Jury further charges: THAT

On or about March 3, 1981, at Los Gatos, County of Santa Cruz, Northern District of California,

WILLIAM D. MERCHANT AND
CLEO L. MAROHN,

defendants, did knowingly and willfully possess approximately 190 gallons of piperidine with intent to manufacture phencyclidine.

COUNT FOUR: (18 USC § 4)

The Grand Jury further charges: THAT

On or about March 3, 1981, at Los Gatos, County of Santa Cruz, Northern District of California,

CLEO L. MAROHN,

defendant, having knowledge of the actual commission by William D. Merchant of felonies cognizable by a court of the United States that is, the manufacture of PCP, a Schedule II controlled substance and the possession of PCC, a Schedule II controlled substance, with intent to manufacture PCP and the possession of piperidine with intent to manufacture PCP, willfully did conceal the same and did not, as soon as possible, make known the commission of these felonies to any Judge or other person in civil or military authority under the United States.

A True Bill.

_____

Foreperson

_____

G. WILLIAM HUNTER
United States Attorney

(Approved as to form: __)
AUSA:JFP

MUNICIPAL COURT OF CALIFORNI[illegible]OUNTY OF SANTA CRUZ
SANTA CRUZ COUNTY JU[illegible]CIAL DISTRICT

CONDITIONS OF PROBATION

FILED

(Date) [illegible]

CLERK OF THE MUNICIPAL COURT

By [illegible] Deputy

THE PEOPLE OF THE
STATE OF CALIFORNIA vs

David William Merchant Defendant

Case No CR-15714

Date 11/4-83

Judge J. A. Merlo

Fine Distribution 5/a C&P

The above named defendant having been convicted of a misdemeanor violation of Section 417 PC 417b PC

IT IS HEREBY ORDERED (applicable items checked)

A. COURT ACTION

( ) Sentenced to _____

( ) Execution of sentence suspended for a period of _____

(X) Imposition of sentence suspended for a period of 3 yrs

(X) PROBATION GRANTED under the supervision of the Probation Officer for a period of Three years from date of this order

( ) SUMMARY PROBATION GRANTED for a period of _____ from date of this order

( ) PROBATION MODIFIED Original terms in full force except as amended herein.

( ) PROBATION REVOKED Defendant found in violation of probation.

( ) BENCH WARRANT ordered BAIL $ _____

( ) PROBATION REINSTATED Original terms in full force except as amended herein

( ) PROBATION EXTENDED to expire _____

B. CONDITIONS OF PROBATION:

(X) Obey all laws.

(X) BE CONFINED in the County Jail 10 days/months, 417 PC

(X) 20 days/months suspended.

( ) CREDIT for _____

(X) STAY OF EXECUTION granted to 12-13-83, 7:30 am and defendant ordered surrender to the Sheriff at that time.

( ) CONFINEMENT to be served _____

( ) Appear Sheriff's Dept. for processing on _____

(X) Work furlough/school program recommended.

( ) Not to be under influence of alcohol at time of reporting for or during confinement.

( ) PAY A FINE OF $ _____ plus A P $ ___ TOTAL DUE $ ___

( ) Suspend payment of $ _____ plus A P $ ___ Bal Due $ ___

( ) Credit of $ _____ for ___ days served Bal Due $ _____

( ) TO BE PAID to the CLERK of the Court as follows _____

( ) TO BE PAID through the Adult Probation Office

( ) IN DEFAULT of payment of fine, serve one day in the county jail for each $30 not paid.

( ) MAKE RESTITUTION to the victim in the amount of $ _____

( ) Payable through the Adult Probation Office

( ) Complete _____ hours of Volunteer Service and return to Court on _____ at 8 30 a m for Proof of Completion

( ) Within five days call the DWI Director 429-4534 for instructions on th Drinking Driver course and complete without interruption Pay the furthe of $ _____ Course will be ( ) 4 weeks, ( ) 8 weeks

(X) Participate in an educational, vocational or therapeutic program directed by the Probation Officer.

(X) Submit person, vehicle, place of residence to search and seizure at an time of day or night, with or without benefit of warrants as directed b probation officer or any peace officer.

( ) Project Busy

( ) Submit to periodic drug/alcohol testing if directed by probation officer peace officer.

( ) Totally abstain from use of alcohol/intoxicants.

( ) Shall avoid places where alcohol is the chief item of sale.

( ) Submit to chemical test if stopped for driving while under the influence

( ) Shall not drive a motor vehicle unless properly licensed.

( ) License suspended for a period of _____

( ) Review date: _____

(X) Other not possess any firearms during period of probation

Order for weapons to be destr

JUDGE OF THE MUNICIPAL COURT

I certify the foregoing is true copy of the order judgment rendered on the above date by the above-named Judge.

JANET OLIVAS, CLERK OF THE ABOVE NAMED COURT. By _____, Deputy

DEFENDANT MUST ABIDE BY ADDITIONAL TERMS AND CONDITIONS OF PROBATION AS SET FORTH ON REVERSE OF THIS FORM.

I have received a copy, read and understand the above conditions of probation

David Merchant Defendant.

Address: _____

Telephone No. _____

MC 33 (Rev. 4/79)

White - File
Green - Jail
Canary - APO
Pink - D A.
Goldenrod - Defendant

I hereby certify the foregoing instrument is a correct copy of the original on file in this office.
DATED: 5-17-84
Robert Wernette, County Clerk
By [illegible] Deputy

BEST AVAILABLE COPY

MUNICIPAL COURT OF CALIFORN
COUNTY OF SANTA CRUZ, SANTA CRUZ COUNTY JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff

vs

David William Marchant, Defendant

CHARGES 417 PC 417b PC

AGENCY

NEXT COURT APPEARANCE DATE

at

NOTICE, SENTENCE, COMMITMENT, PROMISE TO APPEAR, BAIL FORM

Case No CR-15714

Date & Time November 14, 1980 at 10AM

Type of Hearing probation report/sentence

Judge Marlo motion new trial

Reporter Harbin

D.A. Patty Phelan

☒ Defendant present ☐ not present ☐ without attorney ☒ with/by attorney Zac Tur.

☐ Appoint P D ☐ Obtain attorney ☐ Pretrial conference ☐ Diversion terminated

☐ Continued arraignment ☐ Jury Trial ☐ Court Trial ☐ Pay $ _____ Attorney Fees

☐ plea dispo. ☐ Preliminary Examination ☐ Case dismissed

☐ O/R Hearing ☐ Bail Review ☐ Report to Probation Dept. ☒ Probation granted 3 yrs Formal

☐ Not Guilty by plea/verdict ☐ Diversion Hearing ☐ Bench warrant ordered. Bail $ ___

☐ Guilty by plea/verdict ☐ Probation/Sentencing ☐ Bench warrant ordered set aside

☐ Setting ☐ Test Results

☐ Nolo Contendere ☐ waives time ☐ deny/admit prs. ☐ waives rights

Appeal on 2nd Count - fail - upon Count

CUSTODIAL STATUS BEFORE SENTENCE

☐ Remanded to custody of Sheriff until next appearance. Bail $ _____

☐ Remain at liberty on bail ☐ Remain at liberty on O/R ☐ Released on O.R. ☐ Ordered discharged

SENTENCE AND CUSTODIAL STATUS

Jail: Serve 18 ~~days~~/months ☒ 12 ~~days~~/months suspended (1yr - 417BPC 6m - 417A)

☐ Credit for time served pursuant to PC2900.5

☐ To be served consecutively/concurrently with

☐ Sentence to be served

☒ Work furlough program

☒ Stay of execution granted to 12-17 @ 7:30 Am and defendant ordered to surrender to Sheriff at that time.

☐ Appear Sheriff's Dept. on for processing for Weekend Program.

☐ Resume weekend

☐ FINE Pay fine of $ _____ OR ☐ spend one day in jail for each $30.00 of fine unpaid. ☐ Fine due forthwith.

☐ Suspend payments of $ _____ plus A P $ _____ ☐ Payments granted

☐ Remanded to custody of Sheriff until sentence is satisfied in full. Stay of execution

☐ Resume Payments ☐ Account Card

SHOW PROOF OF (Compliance will vacate appear date) CODE

☐ Fine Paid in Full ☐ Valid Driver's License ☐ _____ hrs. Volunteer Work

☐ Traffic/Drink-Drive Class ☐ $ _____ Restitution Made ☐ Sentence Suspended

☐ Other

Argument re Reg Ltr. Denied. - Motion to Set Aside Conviction. Granted. Person to be released under own recognizance. Bail Exonerated. Not to leave jurisdiction during probation. Report to be completed by Dec 12, 1980.

BAIL

$ _____ Cash Bail Bail Bond No.

☐ Exonerated ☐ Forfeited ☐ Forfeiture set aside ☐ Other

I certify the foregoing is a true copy of the order judgment rendered on the above date by the above-named Judge.

CLERK OF THE ABOVE NAMED COURT By _____, Deputy

PROMISE TO APPEAR:

DEFENDANT, BEING RELEASED ON HIS OWN RECOGNIZANCE, AGREES THAT: (a) He will appear at all times and places as ordered by the Court or magistrate releasing him and as ordered by any Court in which, or any magistrate before whom, the charge is subsequently pending. (b) If he fail to so appear and is apprehended outside the State of California, he waives extradition. (c) Any Court or magistrate of competent jurisdiction may revoke the order of release and either return him to custody or require that he give bail or other assurances of his appearance as provided in part 2, title 10, chapter 1 of the Penal Code.

Executed on By _____, Defendant

DISTRIBUTION: WHITE - JAIL, GREEN - FILE, CANARY - CJIC, PINK - D A , GOLDENROD - DEFENDANT

SMC 41 (REV 8/77)

(Performance bond; able to be out pending appeal)

I hereby certify the foregoing instrument is a correct copy of the original on file in this office. SANTA CRUZ COUNTY JUDICIAL DISTRICT

DATED: 5-12-81 Robert Wandruff, Clerk

By Jacqueline Seyfried, Deputy

BEST AVAILABLE COPY

IN THE MUNICIPAL COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CRUZ

NO. CR 15714

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF,

v.

DAVID WILLIAM MERCHANT, DEFENDANT

REPORTER'S TRANSCRIPT OF SENTENCING HEARING
COURTHOUSE ANNEX, WATSONVILLE, CALIFORNIA
NOVEMBER 14, 1980
BEFORE THE HONORABLE JOHN A. MARLO, JUDGE

APPEARANCES

For the People: PATRICIA BAZAR
Deputy District Attorney

For the Defendant: SAM L. FOSTER
Attorney at Law
1084 Cass Street
Monterey, CA 93940

Margaret J. Harbin, CSR
Official Court Reporter C2806

FRIDAY, NOVEMBER 14, 1980 10:00 A.M.

[2] **PROCEEDINGS**

THE COURT: We will proceed with the Merchant matter. The Court has received two letters; one from Mr. Payne, and one from Dr. Anderson submitted by defense counsel. This is the time set for probation report and sentencing.

MS. BAZAR: I would just like to state to the Court that—I realize it came up last time when we were present in court that the Court had received a number of letters from people in regards to sentencing, some of which were marked "Personal and Confidential." I have thought very seriously about the matter and in all fairness to the individuals who wrote the letters, I feel I have to respect their wish for privacy and confidentiality. Therefore, I would simply ask that the Court disregard any letters that he received and sentence Mr. Merchant based only on the probation report, his previous criminal record, arguments made in court today and the facts in the case itself.

THE COURT: All right. Mr. Foster, do you wish to present any evidence at this time?

MR. FOSTER: No. I have no evidence to present, your Honor.

THE COURT: Are you prepared then for the imposition of sentence?

MR. FOSTER: Yes, your Honor.

[3] MS. BAZAR: Your Honor, I would like to address a recommendation, the People's recommendation for the sentencing, since it does differ slightly from the probation report. Our preference in this matter would be that Mr. Merchant be sentenced to six months in the County Jail on the 417 that he was convicted of and that the entire year in jail that he could possibly do on the 417 be suspended, he be given three years formal probation and no guns and a search provision. I believe that differs slightly from the probation report in that they recommended 365 days, 240 suspended. We would prefer that the six months be given

in full on the 417 and the entire year remain on the 417(b). The purpose of which obviously is I think it would be to State's benefit to have the maximum amount of control over Mr. Merchant over the next three years.

THE COURT: Mr. Foster, do you wish to comment on that? That is exactly what I had written in my notes.

MR. FOSTER: Oh, I guess it is not going to make any difference.

THE COURT: That is what I was thinking myself as a sentence.

MS. BAZAR: I was not aware of what the Court's sentence was going to be.

THE COURT: No. It is on my file. I felt, and the reason for that is I think the maximum time as it were suspended is going to be of more benefit than spending [4] 240 days in the County Jail. It is just a long ongoing problem, and I would like to see it corrected; and I am sure Mr. Merchant would, too.

MR. FOSTER: I would, too, your Honor. The problem that I have, and I realize the Court—and I respect the Court's judgment in this matter—and I realize it feels it has responsibilities both ways; that is to Mr. Merchant as well as to society. I just have to tell the Court that my experience of David and his family has been only—and this isn't coming from advocacy, I am not pitching you at all—is he has been a loving man, he has been very, very kind with his family. I have seen him come to the assistance of a young juvenile that was charged with a crime in Santa Clara County and take the responsibility of getting me involved and having his family take care of the legal fees, and we got a lie detector test and that young man's innocence was proven. He went to bat for that individual. I have never seen David in a state like this nor have I ever talked to anyone other than the people that he has had conflict with that have stated anything like that,

and I realized that under the circumstances of this case that he was—it was unusual circumstances, and he was found guilty.

The thing that I feel that is highly contradictory of any attempt to hurt anyone or even threaten anyone is his conduct in actually seeing the police officer and walking [5] toward him and throwing the gun away and coming toward the police officer in a peaceful manner rather than holding the gun and threatening him as he did. It is highly incredible that David would do that, and I believe the police officer actually believed what he saw. I don't think he is lying or trying to hurt David or make up anything that would be to David's detriment. In fact, I saw those two gentlemen talking peaceably about the circumstances. I think the police officer had in his head that there was a wild man out there and then when he saw the situation, he probably drew that conclusion. I think it was a fair conclusion for him to draw. I realize that I am stuck with the verdict. I just would think that one of the benefits rather than placing him in custody for this long period of time would be to look at the alternative of a substantial period of time over his head and allow David either to do community service, if that's physically possible, or to pay a large fine and have the Court control him from that standpoint. I think time in custody under the circumstances of this case didn't really serve the benefit of this County nor David or anyone else. And I can see your point of view of cut time and suspended time so I would just submit it on that basis.

THE COURT: If I were to judge Mr. Merchant with the contacts with him in court, I would agree. In fact, in the last situation that he had was the same. His demeanor [6] and approach in court is certainly inconsistent with what he does with guns, but that's what concerns the Court is this gun business.

THE DEFENDANT: Your Honor, no one has ever claimed I tried to hurt anybody with a weapon. No one has ever even made that claim.

THE COURT: Well, this incident—

THE DEFENDANT: I am sure as a former police officer in your own mind there is a distinct line. You had many times the opportunity when you could fire or not fire. When I ran a motorcycle shop in San Jose, I had a loaded shotgun behind the door and a guy came in and robbed me and turned his back to me and walked out, and I had the option and certainly the right, having been just armed robbed, that I could have shot him. Instead, I let him walk out the door, and I called the police because the alternative with him having a loaded gun in his hands was either shoot him dead or let him go and it turns out they caught him three blocks down the street. But my willingness to harm someone is a long way from my willingness to attempt to protect my property. And as Mr. Foster says, I think that the policeman believes—I talked to him when everybody else was gone—and he believes that's what he saw.

THE COURT: What really scares me, Mr. Merchant, in my role in protecting the community is that you are just that close in certain instances to violence being [7] committed, and you are just not a man that should have or be near any guns at all.

THE DEFENDANT: I would be more than willing to say I have some provision—

THE COURT: I made that a provision before.

THE DEFENDANT: Which I complied with to the extent that it cost me several thousand dollars.

THE COURT: But here we are again three years down the road with the same problem and had the officer acted any differently, you might have been the recipient of some bloodshed. That is the scarey [*sic*] thing about you and guns.

THE DEFENDANT: That is very true, sir.

THE COURT: Well, I am going to impose sentence at this time. I am going to place the Defendant on three years of formal probation. As a condition of probation Defendant is to—will receive a one year jail sentence for violation of 417(b) of the Penal Code. That sentence will be suspended. The Court will impose a jail sentence of six months on the violation of Section 417 which sentence is to be served as a condition of probation which means there will be a total of eighteen months and twelve months will be suspended. One of the conditions of probation will be that the Defendant submit his person, residence or vehicle to search and seizure at any time of the day or night by a peace officer with or without a warrant. As having in the probation report to participate in a [8] counseling program as directed by the Probation Officer and not to possess any firearms during the period of probation.

MS. BAZAR: Is that search only extended to his person and his vehicle and not his residence?

THE COURT: I have person, residence and vehicle. I am just reading it from the report.

MS. BAZAR: Fine, I didn't catch the residence.

THE COURT: And I think you will find, Mr. Merchant, that the six month sentence is less than six months. Actually, I think it is four months.

THE DEFENDANT: Well, what this means to me is everything I own.

THE COURT: Well, that is not my intention to do that, Mr. Merchant.

THE DEFENDANT: I have $1,500 a month tractor payments which I cannot make in jail.

THE COURT: I will give you a stay of execution to allow you to enter any work furlough program. I don't want anyone to lose their job.

MR. FOSTER: What I would like to do, your Honor, I do feel strongly about the second Count so I would like to file a Notice of Appeal, if I could at this time.

THE COURT: Yes. The sentence will be stayed pending your appeal.

MR. FOSTER: Do you want bail set on that or do you want to remain OR?

[9] MS. BAZAR: Your Honor, we ask bail be set and bail be set quite high. I have all of Mr. Merchant's old files, and I find out of six files he has failed to appear on at least four of them at different points.

THE COURT: I don't recall him ever failing to appear in my court on anything.

MS. BAZAR: I don't know if they were in your court or not. They may have been when they were still in front of Judge Kessell. I do not know.

MR. FOSTER: My experience with Mr. Merchant he has always kept his agreement to be in court, and I have never—he has lived here for many years.

THE COURT: I am not going to set bail. He has made his appearances in this matter to my knowledge and the other matters.

MR. FOSTER: Your Honor, we will proceed rapidly with the appeal to get that determined.

THE COURT: I should set a date.

MS. BAZAR: I believe the date has to be set for the matters to keep—

THE COURT: I will set the matter for report for confinement on the 13th of December at 7:30 A.M. which is a Saturday. If you are interested in work furlough, even though he is going to file an appeal, you should contact the Probation Office as soon as possible.

MR. FOSTER: If the appeal proceeds, then does [10] the stay continue?

THE COURT: Yes.

MR. FOSTER: Fine. I will get the notice to prepare Clerk's transcript. Thank you. What time is that on the 13th?

THE COURT: 7:30 A.M.

MR. FOSTER: So if I do proceed with the appeal, I just notify with the Court and they will set this time aside.

THE COURT: That is my understanding.

MS. BAZAR: Excuse me, your Honor, there is one other matter. I forgot at the time of trial to ask the Court to please order the destruction of the weapon itself, an administrative thing that has to be done.

THE COURT: It will be destroyed instead of sold like the last one.

MS. BAZAR: Fine.

THE DEFENDANT: That is a $1,000 weapon.

THE COURT: Is this a different weapon that [*sic*] was used the last time?

MR. FOSTER: .38.

THE COURT: From the one he was put on probation.

MR. FOSTER: These are required to be destroyed under the Code.

MS. BAZAR: The weapon that is involved in this case is the same gun that he was—

[11] THE COURT: I thought he was going to sell that.

MS. BAZAR: It was sold. Apparently somewhere along the line it was returned to Mr. Merchant.

THE COURT: I would like that pursued because that attorney represented it would be sold.

MS. BAZAR: Your Honor, it is being pursued by our office.

THE COURT: I would like to know how he ended up with the gun. If the attorney is the one who bought it, there may very well be some ethical standards violated by counsel. I don't know.

THE DEFENDANT: He did not provide me with a weapon. It went a number of other ways. Is it possible it could be ordered sold to a gun dealer in Los Angeles?

THE COURT: We did that last time, and you ended up with the gun. It is going to be destroyed.

MS. BAZAR: Thank you.

THE COURT: You have another matter, CR-13431.

MS. BAZAR: Your Honor, I hesitate to dismiss this pending the outcome of the appeal.

MR. FOSTER: That is all right. We will waive time on it and wait for the outcome of the appeal.

MS. BAZAR: If that's all right with the Court.

THE COURT: Why don't I continue it for further proceedings on January 15th at 9:15.

MS. BAZAR: Fine.

IN THE MUNICIPAL COURT OF SANTA CRUZ COUNTY JUDICIAL DISTRICT COUNTY OF SANTA CRUZ, STATE OF CALIFORNIA

NO. CR-15714

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF,

v.

DAVID WILLIAM MERCHANT, DEFENDANT.

NOTICE OF MOTION FOR CLARIFICATION AND/OR MODIFICATION OF STAY OF JUDGMENT AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

TO: SAM L. FOSTER, ATTORNEY AT LAW:

PLEASE TAKE NOTICE that on February 18, 1981, at 10:00 a.m. in Department A, or as soon thereafter as the matter can be heard, the People will move for a clarification and/or modification of the Municipal Court's stay of execution issued in this matter.

The motion will be based on this Notice of Motion and the attached Points and Authorities.

DATED: February 11, 1981.

ARTHUR DANNER III
District Attorney

By /s/ PATRICIA A. BAZAR
Patricia A. Bazar
Assistant District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

On September 25, 1980, a jury found defendant guilty as charged on two counts for violating Section 417 and 417(b) of the Penal Code. On October 30, 1980, defendant was sentenced to 6 months in county jail and 3 years of formal probation with 1 year on county jail suspended and a search clause. When defendant filed an appeal from these convictions, the trial court issued an ex parte order staying execution of the judgment.

ARGUMENT

Section 1467 of the Penal Code provides:

> "An appeal from a judgment of conviction does not stay the execution of the judgment in any case unless the trial or a reviewing court shall so order. The granting or refusal of such order shall rest in the discretion of the court."

The statute thus provides that execution of a judgment is not stayed pending an appeal unless the court explicitly so orders. The decision whether to grant such a stay rests in the trial court's sound discretion and an abuse of that discretion will rarely be found by an appellate court, particularly where the appeal is frivolous. See the cases of *People v. Bryan* (1970) 3 CA3d 327, 343, *People v. Sullivan* (1952) 110 CA2d 4, *People v. Williams* (1958) 162 CA2d 141, and *People v. Rodgers* (1940) 38 CA2d 360, construing Section 1243 of the Penal Code, a similar statute applicable to appeals from Superior Courts.

In addition it would appear that an order granting probation is not stayed unless the court explicitly so orders, *In re Stallings* (1970) 5 CA3d 322. Section 1243 of the Penal Code distinguishes the execution of a judgment from the execution of an order granting probation. Thus, an order

granting probation could conceivably go into effect, if not expressly stayed, even though execution of the rest of the judgment was stayed. Although Section 1467 does not mention orders granting probation, the results should be the same under two such similar statutes.

The stay order issued in this case, however, is not clear as to whether or not the probation was stayed along with the rest of the judgment. If the Court intended to stay only the remainder of the judgment and allow the probation to go into effect, the People ask that the order explicitly so state.

If, on the other hand, the trial court originally intended to stay the entire judgement, the People respectfully request that the Court reconsider that decision and exercise its discretion in light of the facts that now exist. Since the stay was issued, defendant has appealed from both counts on which he was convicted, rather than just one. If he had appealed only one count, the probation ordered on the second count would probably have taken effect. Now that both counts have been appealed, however, the probation is ostensibly affected by the stay. In addition the brief filed by defendant on his appeal shows that his contentions lack both merit and support in the law. Thus, his conviction will probably be affirmed on appeal. Therefore, the People ask that the Court modify its stay on execution to allow the probation granted to be instituted.

CONCLUSION

On the basis of the foregoing Points and Authorities the People respectfully request that the Court clarify and/or modify its stay of execution to permit the ordered probation to be instituted pending defendant's appeal.

Dated: February 11, 1981.

ARTHUR DANNER III
District Attorney

By PATRICIA A. BAZAR
Patricia A. Bazar
Assistant District Attorney

(Proof of Service by Mail – 1013a, 2015.5 C.C.P.)

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CRUZ)

I am a citizen of the United States and a resident of the County aforesaid. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 701 Ocean Street, Room 250, Santa Cruz County Governmental Center, Santa Cruz, California, 95060. On February 11, 1981, I served a copy of the within _____ NOTICE OF MOTION FOR CLARIFICATION AND/OR MODIFICATION OF STAY OF JUDGMENT AND POINTS AND AUTHORITIES IN SUPPORT THEREOF _____

_____

on the interested party(ies) in said action by placing a true copy thereof fully prepaid in the United States mail at Santa Cruz, California and addressed as follows:

Sam L. Foster, Esq.
Attorney at Law
1084 Cass Street
Monterey, CA 93940

I, LYNN LEWIS, certify under penalty of perjury that the foregoing is true and correct.

/s/ LYNN LEWIS
Lynn Lewis

DAO 362

[COVER PAGE TO PARTIAL TRANSCRIPT OF PROCEEDINGS OF APRIL 29, 1981]

MUNICIPAL COURT OF THE SANTA CRUZ COUNTY JUDICIAL DISTRICT COUNTY OF SANTA CRUZ, STATE OF CALIFORNIA

No. _____

PEOPLE OF THE STATE OF CALIFORNIA PLAINTIFF,

v.

DAVID WILLIAM MERCHANT DEFENDANT

REPORTER'S TRANSCRIPT OF PROCEEDINGS
COURTHOUSE ANNEX, WATSONVILLE, CALIFORNIA
APRIL 30, 1981
BEFORE THE HONORABLE JOHN A. MARLO, JUDGE
(Continuation of April 29, 1981)

APPEARANCES

For the People: THOMAS KELLEY, ESQ.,
Assistant District Attorney

For the Defendant: MICHAEL STEPANIAN, ESQ.,
Attorney at Law

LINDA LEAVITT, ESQ.,
Attorney at Law

Reported by: CORINNE M. KAITZ
Shorthand Reporter

Case No. CR 15715

[167] * * * * *

PATRICIA BAZAR

called as a witness on behalf of the Plaintiff, was duly sworn, and testified as follows:

DIRECT EXAMINATION

BY MR. KELLEY: Will you state your full name?

A. Patricia Bazar.

Q. You are an Assistant District Attorney, County of Santa Cruz?

A. I am.

Q. Are you the prosecuting attorney in CR 15714?

A. If that's the 417 and 417(b) which was tried in November, yes.

Q. You are the attorney who tried that and prepared the sentencing?

A. Uh-huh (indicating yes).

Q. Did you seek a clarification of the sentencing which happened on November 14th last year?

A. Yes.

[168] Q. And prior to that actual hearing on the clarification, what, if anything, had been happening in regard to this case, that you have personal knowledge of?

A. Well, since the sentencing itself, we were getting – I was talking to the neighbors.

MR. STEPANIAN: I will object to these statements. First of all, the question is vague, what was happening in this case since then; and I would say they are hearsay statements and have no relevancy.

THE COURT: Sustained.

BY MR. KELLEY: Q. Did you recieve phone calls from the neighbors surrounding the address at 25977 Highland Drive, Santa Cruz?

MR. STEPANIAN: Again, your Honor. I would say it's a leading question and calls for a hearsay statement, so I'd ask the question and potential statement be stricken.

MR. KELLEY: Statements will be offered solely for probable cause to explain subsequent action, not for the proof of them. His point is well taken there.

MR. STEPANIAN: Your Honor, this is a probation search which, as far as what probable cause that's been testified to, as far as her getting these statements before the clarification, I think it's getting pretty far afield. And for the purpose of probable cause, I do—

THE COURT: I'm going to sustain it. We have already gotten into the actual discussion of the search warrant. [169] I am going to sustain it.

MR. KELLEY: On what grounds?

THE COURT: On the basis that it was hearsay.

MR. KELLEY: It's not being offered for the truth of the matter. If a person has a search clause, you can't go execute it because it's there. You have to have reasonable grounds.

THE COURT: I understand that, but we have already done that.

MR. KELLEY: So you're ruling it cumulative?

THE COURT: Yes.

BY MR. KELLEY: Q. May I ask if you took some of the calls personally?

A. Yes.

Q. And you communicated that information to police officers?

A. Yes.

Q. And did you accompany them on the execution of that probation search clause?

A. Yes, I was there on the first day and drove by on the second day.

Q. All right, and on the first day, at some occasion, did you have a phone conversation?

A. Yes, I did.

Q. With Sam Foster?

A. Yes, I did.

Q. And after the phone conversation, what happened between you and Mr. Merchant, if anything?

[170] A. I don't know that anything happened specifically between Mr. Merchant and myself after that conversation. The conversation was sort of a three-way conversation. Mr. Merchant originally called Mr. Foster and then at one point gave the phone to me. I talked to Mr. Foster, gave the phone back to Mr. Merchant, he talked to Mr. Foster, gave the phone back to me. I was the individual who eventually terminated the conversation.

Q. Did you have any directive given to Mr. Merchant that there would be a search at that time for guns?

A. Directive? To whom?

Q. Any peace officer.

MR. STEPANIAN: Object.

THE COURT: Sustained.

BY MR. KELLEY: Q. What, if anything, did you observe the defendant doing after the phone call with Mr. Foster?

A. Well, he stated that the guns were only in two rooms and he wanted to take the officers to just those two rooms and stated he would get the guns from the two rooms and simply said more than once that they were only in two areas of the house.

Q. Okay, and were his wishes followed, to your knowledge?

MR. STEPANIAN: Your Honor, I assume these are hearsay statements. I thought they were for probable cause.

MR. KELLEY: They are admissions by the defendant [171] that he in fact had the guns.

MR. STEPANIAN: Excuse me, we can explore that later. But I will object to them.

THE COURT: Objection will be noted.

BY MR. KELLEY: Q. After he made those statements, what happened?

A. Well, initially they—he went with two or three of the officers to a room in the upstairs and they began to bring guns down.

Q. How long—what happened at that point?

A. At that point, one of the officers found a gun in an area which was not in the two locations that Mr. Merchant said they were going to be, and at that point a more, I don't know, generalized search of areas in the house other than the original two rooms began to take place.

MR. KELLEY: Thank you. That's all.

CROSS-EXAMINATION

BY MR. STEPANIAN: Q. Did you have a conversation with Mr. Danner sometime before this motion to—that was heard on February, concerning the search and seizure clause, which was had in this courtroom?

A. Are you speaking about the Motion to Clarify?

Q. Well, I see here you made a Notice of Motion for Clarification and/or Modification of Stay of Judgment and Points and Authorities in Support Thereof. I am going to show you a copy of a motion that is signed by you [172] which is a Notice of Motion for Clarification and/or Modification. Are you familiar with this document?

A. Yes, I am.

Q. Did you write it?

A. I wrote portions of it. I had a law clerk in our office write portions of it.

Q. Did you yourself write the factual matters in the case and the law clerk researched the law?

A. I remember giving her the information, I don't specifically remember which of us—she wrote out the majority of the motion. I did some preliminary research and gave her the factual scenario.

Q. Put it this way. Which cases did you write?

MR. KELLEY: Objection as to relevancy.

THE COURT: Overruled.

BY MR. STEPANIAN: Q. In other words, you gave a general outline to a law clerk. You gave the law clerk an idea on what you wanted to do in this case; is that correct?

A. I gave her a factual situation and some preliminary research I had done on the issue; I wanted her to research. I explained what kind of motion I wanted and asked her to write me a motion. She turned one in to me. I went over it, asked her, I believe, to clarify a couple points in it, and approved it, had it typed up by my secretary.

[173] Q. Did you have a discussion with Mr. Danner, who is your boss, prior to giving those instructions to the law clerk?

A. About that motion specifically?

Q. Yes.

A. Not about that motion; about the fact that I was attempting to figure out a solution to the problem that resulted in that motion, yes.

Q. What was the problem? In other words, you basically wanted to put, to make sure the search condition was in effect; is that correct?

MR. KELLEY: Object to the relevancy of the whole area. We have been over this.

THE COURT: Not with this witness. Overruled.

BY MR. STEPANIAN: Q. You wanted to make sure that the search condition was in effect; is that correct?

A. No, what I discussed specifically with Mr. Danner was—

Q. I am not talking about Mr. Danner, I am saying this motion. You wanted to make sure—

A. I wanted to clarify that stay of execution, yes.

Q. Whether by clarification, modification, or reinstatement; is that correct?

A. More or less.

Q. When you went to Mr. Danner and you spoke to Mr. Danner about this—

A. I didn't speak to him specifically about the motion. I [174] spoke to Mr. Danner earlier when I asked him some general questions on what his understanding of the law was in regard to the affect of an appeal on a sentence and what specifically a stay of execution meant. Jurisdictional questions, things on those lines. Explained to him my problem to see if he had ever come in contact with a situation like that before.

Q. You mean where there was a stay order on appeal and the basic question being does this in fact stay the probation, the search clause, either, correct?

A. I don't even know if I defined it that fully. I wanted to know from him if he had ever had a situation where an individual had been convicted and sentenced, had taken the matter up on appeal, but there was still the same type of problem occurring in the period before the appeal had been heard and what do you do about it at that point.

Q. Concerning the fact that, well, you are not sure on whether the search and seizure clause in the original sentence was in effect; is that correct? You are not sure about that?

A. At the time I spoke to Mr. Danner, I wasn't. I wasn't sure what the effect of the stay was.

Q. What happened was you had a conversation with Mr. Danner. Did he give an opinion to you?

A. Yeah, well, he gave me an opinion. His opinion was that he had never encountered it and why didn't I ask Joyce, [175] the law clerk.

Q. And at that point, did you ask Joyce, the law clerk; and did you go and ask Joyce, the law clerk?

A. No, he gave me some ideas on where to look and the portion of the Penal Code, and I went and looked at that and some of the statutes on appeal and tried to get the situation a little clearer in my mind. And I ran across some

cases, specifically on the extent of the stay, and that's when the idea of a motion for clarification seemed like an appropriate way to go.

Q. Fine. Now did you speak to Judge Marlo at all concerning your problems as to what the interpretation of the stay was?

MR. KELLEY: This was prior to the motion?

MR. STEPANIAN: Prior to the filing of this motion.

THE WITNESS: I don't recall. As I recall, I think I saw him and mentioned that I had filed a motion.

BY MR. STEPANIAN: Q. Did you mention on what the motion was that you had filed?

A. Well, that it was for clarification of the stay, yes.

Q. And did you ask the Judge when this could be heard?

A. No, because that was one of the problems. I forgot to get a waiver of the ten-day time period and I didn't get my motion filed in time. So we had to extend the first deadline.

Q. And then you sort of discussed the time on this as far as [176] his order shortening time?

A. No, I noticed the motion and gave the particular date but I didn't give the requisite ten-day notice. And I didn't discuss it with Judge Marlo because when I came into court, I was informed I hadn't complied with the ten days and we set it for a date later in the month.

Q. Was Mr. Foster there?

A. No.

Q. So when you made a motion for clarification at that point, did you notify Mr. Foster?

A. Yes.

Q. Mr. Foster was not there at that time, correct?

A. No.

Q. But you were ready to proceed on this motion; is that correct?

A. Well, I had hoped Mr. Foster would be here even though I hadn't complied with the ten days' notice.

Q. But in fact, they were not here. Would you have proceeded with this motion if the Judge would have heard it?

MR. KELLEY: Argumentative and calls for speculation.

THE COURT: Overruled.

BY MR. STEPANIAN: Q. You said you tried to begin the motion but there wasn't a compliance with the ten-day rule; is that right?

A. I came down here hoping that Mr. Foster would appear and we could discuss the motion. He didn't. I couldn't [177] proceed with it and admitted I'd forgotten to get the ten days, and the Court set it over to I think the 27th. And I followed up with a letter to Mr. Foster's office telling him the matter had been continued.

Q. And then it was ultimately heard, correct?

A. Yes.

Q. There was no points and authorities filed in this motion?

A. None that I have received.

Q. Did you have a discussion with the Judge after that hearing in which Mr. Foster was not present concerning what was in this motion?

A. No.

Q. Did you then notify him, send him a letter and set forth another hearing date?

MR. KELLEY: Referring to Mr. Foster?

MR. STEPANIAN: Referring to Mr. Foster.

THE WITNESS: If I remember correctly, the Judge set it and made a statement like the Clerk's Office will inform Mr. Foster of the new date. I left, and when I got back to the office, asked my secretary to type up a letter and sent it to him.

Q. Have you had conversations with Officer Shipp prior to filing this motion?

A. I believe I had. I believe I had with Officer Shipp. I am not positive.

Q. Did you have any conversations with the other officer who [178] testified here a few minutes ago?

A. Lieutenant Kirkland?

Q. Yes.

MR. KELLEY: Is this prior to the filing?

MR. STEPANIAN: Prior to the filing of this motion.

THE WITNESS: I believe so.

BY MR. STEPANIAN: Q. Did you have, and did you discuss these conversations or these calls that you had come from neighbors with him?

MR. KELLEY: At what time?

MR. STEPANIAN: Prior to the filing of this motion.

THE WITNESS: Not in any great detail. The only one I discussed it with in any great detail would be an investigator from our office.

BY MR. STEPANIAN: Q. What is his name?

A. Otis Pogue.

Q. Do you recall having a discussion with the lieutenant?

A. It's possible. I don't know if it was before I noticed the motion or in the period between noticing the motion or the actual date it was heard.

Q. What about before that time period? Is there a potential you had a conversation you can't recall the details?

MR. KELLEY: I object to that as calling for speculation.

BY MR. STEPANIAN: Q. Fine. Did you have a conversation with him prior to the filing of this motion?

[179] A. I don't recall for sure. Probably.

Q. All right, now, did you know that there was a civil document filed with the Court on or around the seventh day of February, 1980 concerning a money judgment and a writ of execution?

A. May I see the document?

Q. Sure.

MR. STEPANIAN: May I approach the witness, your Honor?

THE COURT: Yes.

THE WITNESS: I don't know. There was a, I think there was one originally. I knew of the civil writ. There was one originally that had expired and I believe this was the second one. I don't believe I knew specifically when the second one was filed.

BY MR. STEPANIAN: Q. You were having conversations with an attorney, with an attorney for the man named Collins?

A. Yes, although my conversation with him happened previously.

Q. Have you had a conversation with a man named Collins who was a neighbor involved in a suit?

A. Yes.

Q. It was a fact, is it not, they were in a very heated neighborhood dispute?

MR. KELLEY: Objection, calls for hearsay.

[180] MR. STEPANIAN: Strike that.

BY MR. STEPANIAN: Q. They were in fact complaints by Collins about Merchant, and they share the road, which is adjacent to their property; is that correct?

A. There were certainly at one time between them. I never was quite clear on what exactly the easement problem was, but I was aware it had something to do with an easement problem.

Q. A neighborhood fight between these people?

A. They disagreed about a number of things.

Q. Fine. In fact, you were in communication with Collins. You were in a communication with his lawyer and you knew of this conflict they were having between them, this conflict, correct, prior to this, prior to filing this motion?

A. The communication I had—

Q. Just answer the question, please, You knew they were conflicting, you knew they were neighbors, you had conversations with Collins and you knew there was a writ.

MR. KELLEY: Objection to the question as being argumentative. He is making various points that may not have any relevance to her conversation.

MR. STEPANIAN: I am only asking whether or not you spoke to them.

MR. KELLEY: He can ask whether she had a conversation with the lawyer of Collins prior to the filing.

[181] BY MR. STEPANIAN: Q. You knew there was a writ filed, correct?

A. Yes.

Q. Prior to filing this motion?

A. Yes.

Q. You knew that you spoke to Collins?

A. On any subject? Yes.

Q. You knew that you talked to Collins' lawyer.

A. Back in the fall? Yes.

Q. You knew there was a heated dispute between these people?

A. I don't know if I'd call it heated. I knew it was longstanding and covered a variety of subjects.

Q. It was a feud, basically?

MR. KELLEY: Objection.

THE COURT: Sustained.

MR. STEPANIAN: What would you call it?

MR. KELLEY: Objection, totally irrelevant.

THE COURT: Sustained.

BY MR. STEPANIAN: Q. How long have you been out of law school?

A. I graduated May of 1979.

Q. How long have you been a lawyer?

A. Since November, '79.

Q. Did you work immediately for the D.A.'s Office?

A. Within a few months.

Q. This is your first job as a lawyer; is that correct?

[182] A. No, I worked for a number of attorneys in San Jose.

Q. How many did you work for?

A. I did free-lance criminal law for at one point up to sixteen attorneys.

Q. And then you got this job?

A. Uh-huh.

Q. Okay, now, you have been up to that property before, hadn't you?

A. Yes.

Q. And who did you go up there with?

A. On which occasion?

Q. How many times have you been up there?

MR. KELLEY: Objection to the relevancy. If he wants to give a time period—

MR. STEPANIAN: First, I want to find out—

THE COURT: Overruled.

BY MR. STEPANIAN: Q. How may times were you up there?

A. On the Merchant property on on [*sic*] the private road?

Q. On that private road.

A. Probably six to ten times, maybe.

Q. Okay, and what purpose were you up there for—strike that—I will ask you specifically, did you go up there looking for drugs?

A. I didn't go up there looking for drugs.

Q. Were you told they were growing marijuana up there?

[183] A. I believe the narcotics people were, but yes, I think the information had originally come through a phone conversation they had with Otis Pogue who relayed it to Sheriff's Narcotics.

Q. Did you find marijuana?

A. I didn't look.

Q. You didn't look? Okay, did you go up there and talk to Mr. Collins?

A. I don't believe I ever talked to Mr. Collins in person.

Q. On the telephone?

A. Yes.

Q. Did you go up there while you were investigating this lawsuit?

THE COURT: Which lawsuit?

MR. STEPANIAN: Criminal Case 417, 417(b).

THE WITNESS: Yes.

BY MR. STEPANIAN: Q. How long did you—how many times did you go up there for the 417, 417(b)?

THE COURT: Would you make an offer of proof.

MR. STEPANIAN: I believe, your Honor, that there was an intention to purposely violate Mr. Merchant's rights by this young District Attorney by knowing that although he did not receive notice that there was a violation, that she concocted this clarification, that she accompanied and was instrumental in the police going up there, and it was her idea, instrumented and instigated by a neighborhood dispute with a man named Collins and [184] went there and unconstitutionally and purposefully violated his rights by concocting and creating a motion which she knew full well at the time that this man did not have a search condition on his property and went up there to violate his constitutional rights and create a fraud on the Court based on the fact she was fully aware of the facts.

THE COURT: All right, what's the relevancy?

MR. KELLEY: Based on the offer of proof, I believe there was a finding by the Court on the 27th, the terms in fact were in effect and there were calls not only to this witness, Otis Pogue, for one, from neighbors other than—

THE COURT: We are getting far afield. I don't understand having to do with investigating 417, what that has to do with this proceeding.

MR. STEPANIAN: Here's the point: She was up there a lot. She has a lot of communications up there.

BY MR. STEPANIAN: Q. Did you ever see Mr. Merchant on these trips when you were up there?

A. I never saw his house until shortly before the search warrant.

Q. Your were on that road?

A. The road I was on runs in front, and from the front the asphalt road, and from that road you could see the barn; but I could never see the house. In order to see the [185] house, you either have to get very far down in the Collins property, all the way out in front of their property, or being on the road that runs in front of Mr. Merchant's house, which I was under the impression was his private road.

Q. Let me ask you, do you know anybody who went up there and took a plant which purported to be a marijuana plant prior to your filing this motion from his property?

A. Not that I know of.

Q. Let me ask you this: You attempted to clarify or modify this stay order because, it's true, is it not, that you were not sure as to whether or not the search and seizure clause was in effect at the time that you were writing or researching this project; is that correct?

A. Yes.

Q. And then when you came in court, you knew that Mr. Merchant was there; is that right? Mr. Merchant was not there?

A. Yes.

Q. Right. Was there a waiver of his presence in court?

A. Not at that time. I believe it had happened on other occasions.

Q. Excuse me. On this particular time I am asking you about that day in court.

A. No.

Q. No? Okay, but you had been in court when—we'll strike [186] that. All right, now, so you, after you received, after you received the order by the Judge, did you have an order written and submitted to the Judge?

A. No.

Q. It was an oral order that you went on?

A. It was an oral clarification.

Q. Excuse me, was it a clarification or a reinstatement?

MR. KELLEY: Objection. It's argumentative and irrelevant. She's not the Judge.

THE COURT: Yes.

BY MR. STEPANIAN: Q. As you recall, did the Judge indicate it was a reinstatement of the probation itself in the record?

THE COURT: It's in the record.

BY MR. STEPANIAN: Q. Strike that. Was your intention upon receiving this order by the judge to then put that order in effect?

A. My intent directly after the motion was to go back to the D.A.'s Office and discuss it with a few more people.

Q. Your intention, was it not, was to go up there to the property and have that be in effect; is that not true? You wanted to search that property pursuant to that, pursuant to that search and seizure clause?

A. If that was going to alleviate the problem.

Q. Excuse me, what's the answer to the question? When you filed that motion, was you intention—

[187] MR. KELLEY: I object to Counsel badgering the witness.

THE COURT: She didn't answer the question.

BY MR. STEPANIAN: Q. Was it your intention when you filed this motion that the order was granted?

MR. KELLEY: Could the Court direct the defendant not to read my notes?

MR. MERCHANT: He has been reading mine.

BY MR. STEPANIAN: Q. Did you intend to go up and search that property pursuant to filing those motions to get that modification or whatever it was? Was it your intention to, when you received the order from the Judge, to go up there and search that property?

A. I don't think I understand the question. When did you want my intent?

Q. Let me ask you this: Was it your intention when you noticed and had the hearing on the 27th of February, prior to that time, was it your intention that after you got that order by the Judge that you were going to attempt to execute that order of search and seizure?

A. At the time we had the motion, I considered that possibility.

Q. Well, was it a possibility or was it in your mind as something you wanted to do?

A. At the time, it was something I wanted to do.

Q. And, thank you, you filed this motion for clarification [188] because you wanted, as clear as you could, to make sure tht you could go up there and do that?

A. Yes, I wanted to know what recourse I had, or we had.

Q. Yes, because prior to that time, after conversations with Danner and/or conversations that you had in your attempt to determine the law, you weren't sure whether that stay, whether that order for a stay, stayed the search and seizure clause; it's what you testified to before, you weren't sure?

MR. KELLEY: Objection. Argumentative. Also, cumulative.

THE COURT: Sustained.

BY MR. STEPANIAN: Q. Okay, that's fine. How long was it before you talked to the police officer after you got the order?

A. I probably talked to at least Otis Pogue that afternoon.

Q. Okay, so the motion was heard, the motion, the motion was heard on the 27th; was it not? Morning or afternoon?

A. I think it was in the morning.

Q. Did you put in your petition for clarification that you intended to go up if there was an order, and search that premises?

A. No.

Q. Did you indicate in your motion that there was complaints or anything like that concerning sounds that you heard?

A. No, I discussed that with Mr. Foster.

[189] Q. Excuse me, I am asking you, did you put it in the papers?

A. No.

Q. Did you then go and you saw—you then went and you saw Mr. Otis Pogue, correct? He is an investigator in Santa Cruz?

A. Well, I saw him, I am sure, when I returned to the office.

Q. And did you have a discussion with him?

A. I am sure I did.

Q. And what did you say to him?

A. "Otie, the motion was granted."

Q. Good.

A. And, "I want a search—when can you get together to search?"

MR. KELLEY: Objection.

BY MR. STEPANIAN: Q. Put it this way: What did you ask him to do?

A. I probably said, what do we do now.

Q. Did he then say that he was going to attempt—that's a hearsay statement, I won't get into it now. Then, when was the next time that you had a conversation with any police officer concerning going up there and searching?

A. Probably Tuesday morning or late Monday afternoon.

Q. Isn't it a fact that you told Otis Pogue at the time that we got the order that we should go up there and search it based on the complaints and statements you were [190] hearing on the phone? Didn't you say, "Now we can go up and now we can search because I have an order"? Something such as that? Didn't you say that? You said, "You can do that now."

MR. KELLEY: Objection. Assumes facts not in evidence.

THE COURT: Overruled.

THE WITNESS: I don't recall making that statement.

BY MR. STEPANIAN: Q. Do you recall wanting to do that and trying to find a way, the earliest time you could go up and search?

A. No.

Q. Go on. There was a manpower problem at that time, correct?

A. No, because if I wanted the earliest time, I could have gone up Friday afternoon.

Q. Wouldn't that have given time—

A. I would have wanted to give time to Mr. Foster to talk to his client.

Q. You didn't know whether or not he talked to his client?

A. I assume he talked to his client prior to the motion.

Q. You assume that because lawyers usually tell clients when there are hearings?

A. No, because I couldn't imagine an attorney who would voluntarily put his client in that position and not tell him.

[191] Q. The question is, you did not know whether he told him or not.

A. I don't know, no.

Q. Fine. And afterwards, well, you ended up on Tuesday having a conversation with law enforcement concerning the, concerning going up there and searching that residence; is that correct?

A. Yes.

Q. Okay , and did you make arrangements for you go to up there?

A. Yes.

Q. You wanted to go up there, correct?

A. Yes.

Q. Okay, and you were just determining when this could happen after conversations with Pogue; is that right? In other words, you wanted to know when it was going to happen?

A. Well, as of Friday, I didn't think there had been any determination made as to when or if it was going to be, to be happening.

Q. You wanted to go if it were going to happen?

A. Yes.

Q. It's fair to say it was going to happen very quickly, correct? When people could get organized?

MR. KELLEY: I object. That's calling for speculation.

[192] THE COURT: I will sustain it.

BY MR. STEPANIAN: Q. You were waiting for a call when—did you leave it with Pogue that he was to call or you were to call him as to when this search condition was going to be executed?

A. Neither. I don't remember it being left that certain. That Friday we left it at "we'll see what happens." Since I see him every day, it wasn't a question of setting up right then.

Q. When was the first time that you saw him? When was it that you saw him when arrangements were being made to go up there?

A. As I said, probably late Monday or Tuesday morning, because the murder had happened.

Q. Right.

A. And he was tied up in that, so I don't remember, I don't believe that we would have discussed this. I think we would have discussed probably late Monday or early Tuesday.

Q. So Friday you had a discussion with him concerning the fact that you had the orders?

A. Uh-huh (indicating yes).

Q. Monday you had a discussion that the murder had happened. In the process he mentioned to you he was getting things organized for the search; is that correct? Monday or Tuesday, you said?

[193] A. I don't know that he said he was getting things organized. He indicated that he was going to be tied up in the murder and that I should go, and I think he had already talked to Lieutenant Kirkland or Sergeant Shipp, and I should probably go up and speak to them. And I think I did go up and talk to Shipp.

Q. Did you say you wanted to go along on the ride?

MR. KELLEY: Objection to the terminology.

BY MR. STEPANIAN: Q. Okay. This search, did you make arrangements with Kirkland to go up on the search?

A. Yes.

Q. And when did you do that?

A. Probably late Monday or early Tuesday.

Q. Did you meet them at the firehouse before they went up to the house?

A. No.

Q. Where did you meet them?

A. At the County building.

Q. Then you went to the firehouse with them?

A. Yes.

Q. You all went up to the house?

A. Yes.

Q. You saw the officers at the door in the rear, near the swimming pool?

A. Yes.

Q. And did you see Cleo come to the door?

[194] A. I remember David being at the door. I don't remember Cleo being the first person. I remember her being at the door, but I remember both being there. Excuse me, I do recall, because they had to call him from back somewhere else and he came to the door in a bathrobe.

Q. And did you see a person with a shotgun? One of the police officers?

A. I don't remember specifically, but I am sure they probably had them.

Q. Did Mr. Tanner have a shotgun?

A. I don't recall. I don't remember.

Q. Did you—who was the first person you saw enter the residence?

A. I think it was Lieutenant Kirkland. I wasn't specifically at the door.

Q. Well, how many went into the residence at one time? Did one go into that residence?

A. I think only one person went into the residence.

Q. And other people waited outside?

A. Yes.

Q. And that person had a shotgun; isn't that true, if you can recall?

A. I don't recall whether they had a shotgun or not, but, you're right, it was Bob Tanner, I think. Because I think he—

Q. Go on.

[195] A. I am just trying to remember. You're right, it was Bob Tanner, but I believe he had a shotgun, but I don't know if he had or not.

Q. Tanner was inside, other people were inside, other people were outside, ended up in the house with Mr. Merchant at some point. Were you specifically referred to while you were outside, by Mr. Merchant?

A. Yeah, that was after quite a lot of conversation, because I was up above and then I came down to the door.

Q. And the officers were outside the door and one officer was inside?

A. And somebody, I believe Kirkland, said, "Do you know who that is?" or something like that.

Q. Fine, and you then went inside, correct?

A. I went inside. The door opened and I went inside with the rest of the officers, yes.

Q. There was an officer inside, Tanner, and then you and the rest of the officers went inside; that was in the kitchen area, correct?

A. I would say they went in and I followed.

Q. All of the officers and yourself were inside that kitchen area?

A. Not all of the officers, but the officers at the door.

Q. That's what I mean, the officers at the door.

A. Yes.

Q. And you at that point had a conversation; is that [196] correct? On the telephone?

A. Yeah, because I think that—yeah, David was already on the phone.

Q. That's right.

A. With Mr. Foster, and at some point within the first couple minutes, I started talking to him.

Q. Good. And you had a conversation with Mr. Foster on the phone; is that right?

A. Yes.

Q. And it's a fact, is it not, did you tell Mr. Foster the purpose of why you were there?

A. Yes.

Q. And did Mr. Foster tell you that Mr. Merchant did not have any notice of this search, search condition that was reinstated or was the subject of a hearing that you were at with Mr. Foster on the 27th?

A. Yes.

Q. And did he tell you that Mr. Merchant did not have any notice of it and he didn't feel he was subject to the search condition?

A. No, I don't recall discussing the legal aspects of it. I remember Mr. Foster saying he didn't have notice, and I answered, I said, well—

Q. Well, what?

A. I believe I said in a misdemeanor matter, an attorney's actions are binding on his client. The client doesn't [197] need to be present.

Q. No, in other words, the legalities you said to him, he didn't have to be present in response to Mr. Foster saying to you, my client didn't have any notice.

A. Then we had a discussion about his statement that he was going to notice him.

Q. Well, he was going to notice him, but you were all in the house there and there was a discussion concerning the search and the search condition between you and Foster, correct?

A. He said that David didn't have any notice. I said, I don't know if he had any notice or not, but it was my understanding that an attorney can appear for his client. And then I believe I said something to the effect of hadn't you spoken to him or didn't you tell him, or something like that. And the discussion went from there to a discussion of how or why he did or did not.

Q. Okay, and isn't it a fact that Merchant was saying at this time in an agitated way that he didn't have notice and wasn't subject to the search condition?

A. I don't know if it was the same time, but a little bit after that.

MR. KELLEY: I would object if this is offered for the truth of the statement, did he in fact, did not have notice.

THE COURT: As to the conversation?

[198] MR. STEPANIAN: Prior to that time he didn't have notice.

THE COURT: Wait a minute. Who said that—

MR. STEPANIAN: Merchant.

MR. KELLEY: I object if it's going to the truth of the statement. If it's coming in to the fact he made the statement.

MR. STEPANIAN: He has testified to what he said.

MR. KELLEY: Fine.

THE COURT: Okay.

BY MR. STEPANIAN: Q. And then you're saying that Foster had a conversation with you, just related, as to him saying he didn't notify him; is that correct? Please answer so that it can be audible.

A. Yes.

Q. Did you mention at that point, well, we can go on the civil writ?

A. Not at the—what I said to Sam was that we are still going to do the probation search, and in addition to that, we had the writ of execution.

Q. You said that notwithstanding those statements by Sam Foster and notwithstanding those statements by Merchant that you were still going to proceed with the probation search?

A. Yes.

Q. Okay, now, at that point, did you then have a [199] conversation with—strike that—Sam Foster stated he was going to talk to Judge Marlo or something of nature; is that correct?

A. No. I don't recall him ever indicating he was going to call Judge Marlo. When my office called me and told me Judge Marlo had called, I was very surprised.

Q. Did you call Judge Marlo?

A. Yes.

Q. Did you have a conversation with Judge Marlo?

A. Briefly.

Q. Did you tell Judge Marlo you had a conversation with Sam Foster?

A. Yes, I think I did.

Q. Did you tell Judge Marlo that David Merchant did not have notice of his probation search?

A. I don't recall if I mentioned it or not. We didn't specifically discuss much of anything.

Q. Did you have a discussion with Judge Marlo concerning the probation search?

A. No, other than the, other than the fact we were there beginning to start one.

Q. Did you tell Judge Marlo the fact that Sam Foster did not give notice to, did not give notice to Mr. Merchant and that Mr. Merchant said that he did not have notice that he was subject to search and seizure? Did you tell that to Judge Marlo?

[200] A. I don't recall, I don't recall. It didn't seem to me we discussed it in depth.

Q. What was the discussion?

A. I called Judge Marlo, Judge Marlo said something to the effect, I just had a very hysterical phone call from Mr. Foster about something that you were doing, and what were you doing.

Q. What did you tell him?

A. I said, well, we are doing a probation search on David Merchant.

Q. Yes?

A. And he goes, "Oh," and I don't think there was much else to the conversation with the exception of Judge Marlo said on more than one occasion, he said, well, don't, don't take this conversation to mean that I have any

opinion as to whether you should or shouldn't be doing what you are doing. And I thought because Sam was so upset I should return the call.

Q. Did you mention whether or not the man had noticed to Judge Marlo whether or not he was subject to search and seizure?

A. I don't recall. I may have.

Q. You may have?

A. I don't recall discussing specifically the probation search, other than saying, "Well, don't—"

Q. Could it have been possible—strike that.

[201] MR. KELLEY: I object.

MR. STEPANIAN: Sorry.

BY MR. STEPANIAN: Q. Do you have any recollection one way or the other of discussing notice? You had discussed notice about, what, three minutes ago, ten minutes before with Sam Foster, correct?

A. But I wasn't discussing the merits of the case.

Q. I am not asking about the merits. I am talking about notice.

A. That's what I consider to be a legal merit. I don't recall discussing that. I could have.

Q. And it's a fact, is it not, that Judge Marlo said to you that Sam Foster said he, Merchant, had no notice?

A. He may have.

Q. Well, was there anything discussed about what to do when the defendant, Merchant, had no notice? Do you recall?

A. No, there wasn't because there was the whole conversation, the major portion of the conversation was my impression that Judge Marlo didn't want to hear any of the facts of the case. He was simply returning a phone call because Mr. Foster was so upset in whatever phone conversation he had with him.

Q. But the Judge said he had had a conversation with Sam Foster?

A. Yes.

Q. Okay, fine. All right, now, was there any discussion [202] with Kirkland, Kirkland—sorry, stike [*sic*] that—at that point after the conversation with Judge Marlo, was the search in progress or was the search, had the search begun yet?

A. At the time of the conversation with Judge Marlo?

Q. Right.

A. If I remember correctly, it was just when Mr. Merchant was going, taking the officers up to the two rooms upstairs, so it was just started.

Q. In other words, at least at the point where Judge Marlo, it sort of had just started when you had the discussion with Judge Marlo? This was after the conversation with Merchant and Sam Foster but before the termination of the conversation with Judge Marlo, correct?

A. Yes. It was under way because I recall more specifically when it ended in relationship to the search.

Q. Now, various guns were seized throughout this search, correct?

A. Uh-huh (indicating yes).

Q. And these guns were seized and they were being brought down to the kitchen area, correct?

A. Yes.

Q. Where were you at the time this was happening?

A. I was originally, I was originally in the living room, and then when I was talking to Judge Marlo, I was for most of the conversation, I was behind the door in a, [203] like a utility room. You can look through the door. There was a window, and the door was shut, but you could look through the window.

Q. Right. But, you didn't contact the Probation Office prior to going up there?

A. No, he didn't have an assigned probation officer.

Q. So he didn't have an assigned probation officer and there was no communication with the Probation Office on the way up there; is that correct?

MR. KELLEY: Is that to her personal knowledge?

BY MR. STEPANIAN: Q. To your personal knowledge, was a probation officer contacted or was there any mention of a probation officer?

A. I believe at some point somebody asked if he had a probation officer, and I said I didn't think he had been assigned one.

Q. There wasn't even one assigned?

A. As far aş I know, he wasn't assigned one.

Q. Do you recall during this proceeding that there was a suitcase that was being inspected, not opened, by Lieutenant Kirkwood, Kirkland?

MR. KELLEY: Personal observation?

BY MR. STEPANIAN: Q. Did you happen to notice that the lieutenant was looking at a suitcase?

A. Later.

Q. Put it this way; Did you see the suitcase open or did [204] you see the suitcase closed?

A. Both.

Q. Did you see the officer open it up?

A. Lieutenant Kirkland?

Q. Yes.

A. More than once.

Q. Pardon me?

A. More than once, yes.

Q. You saw him open it up?

A. Correct.

Q. A suitcase more than once, yes?

A. Yes.

Q. And this suitcase contained some drugs, correct?

A. Correct.

Q. Prior to opening it up, did anybody say to you, did anybody suggest to you whether or not the officer needed a suitcase—strike that—a search warrant to open up this suitcase? Anybody ever suggest that to you?

A. Lieutenant Kirkland, as far as I knew, wasn't the first officer.

Q. Did any officer suggest to you to have a search warrant to look into the suitcase?

A. Prior to opening that suitcase?

Q. Yes.

A. No.

Q. Okay. Approximately how long was it from the moment that you entered the door to the seeing of Kirkland with the suitcase?

[205] A. Not very long at all. Well, strike that, because I don't think they brought it down right away.

Q. Okay, fine, That's good. That's good. Cleo had left at least by this time?

A. Prior to my seeing Lieutenant Kirkland open the suitcase?

Q. She left?

A. Yes, and I said fine, as far as I'm concerned.

Q. But she left on her own free will?

A. She waited until I asked Sergeant Shipp.

Q. Okay, fine. And she left after that; is that correct?

A. She walked outside and went over to one of the cars, and they found the suitcase and had her come back.

Q. Fine, okay. So, how long would you say that was, getting back to the original question, from the point of Tanner's original entry to the point in which the suitcase was opened by Officer Kirkland?

A. I don't—

Q. An hour? Two hours?

A. No, I am going, fifteen, twenty minutes, maybe.

Q. How much?

A. Twenty minutes, maybe. I don't know.

Q. You don't know; is that right?

A. Well, the suitcase, the end of any phone conversations with Judge Marlo coincided very closely with the time the suitcase was found and first opened by the officers upstairs.

[206] Q. Excuse me, hold it. I will ask that be stricken.

You couldn't see through the wall to see an officer open up the suitcase upstairs, correct?

A. No, but he yelled down–

MR. STEPANIAN: Strike that. That's hearsay.

THE COURT: Stricken.

BY MR. STEPANIAN: Q. I am only talking about Officer Kirkland.

A. Okay.

Q. You saw him open it up?

A. Yes.

Q. Fine, okay. How many weapons would you estimate were found in the area that Mr. Kirkland was at the time he opened the suitcase?

A. Lots.

Q. Lots? Thirty, forty guns basically?

A. I don't know.

Q. You don't know?

A. More than that.

Q. More than that? How many about?

A. I don't think they brought the suitcase down until the majority of the guns were found.

Q. Fine, okay. I am just sort of groping around, Judge, so we can close this out.

MR. KELLEY: Stipulate to that.

BY MR. STEPANIAN: Q. You were in a sort of an area where there was some files or something when you [207] were talking to Judge Marlo, right? There was a file cabinet or something?

A. One side of it.

Q. You were sort of looking at the files when you were talking?

A. No.

Q. You opened the file cabinet, didn't you?

A. After we had the search warrant.

Q. After you had the search warrant? That's the only time you opened the file cabinet?

A. That's the only time I recall being aware of the fact the cabinet was there.

Q. You talk to Judge Marlo in the room where there was a file cabinet?

A. Yes, there is a closet and a bathroom off the kitchen area.

Q. But you knew that the file cabinet was there before you got the search warrant?

A. I was standing in the entry way looking out the window watching what was going on in the room.

Q. Let me get it clear. You knew that there was a file there prior to getting the search warrant?

MR. KELLEY: Strike that. File, or file cabinet?

BY MR. STEPANIAN: Q. File cabinet.

A. I suppose I did.

MR. KELLEY: Objection, relevancy.

[208] THE COURT: I will sustain the objection.

BY MR. STEPANIAN: Q. How many phone calls did you make from that residence?

MR. KELLEY: At what time?

BY MR. STEPANIAN: Q. During the course of the time prior to the search warrant.

A. Maybe four of five, something like that.

Q. Four or five? Who did you call? Judge Marlo?

A. Judge Marlo. I called my office—

Q. Um-hum.

A. And then the phone conversation to get the telephonic warrant.

Q. Let me ask you a question: Did you tell Judge Marlo that you had received these telephone calls from neighbors prior to seeking to modify or clarify this probation? Did you tell Judge Marlo?

A. The sentencing, I did.

Q. No, no, no, no, no.

A. You mean in between the arguing and the—I may have. Yeah, I think I made a comment that we were still having the same problem.

Q. Did you tell Judge Marlo specifically about that, say, from the moment that you asked your researcher to work on that and the hearing thing?

MR. KELLEY: Is Counsel referring to ex parte communications?

[209] MR. STEPANIAN: I am talking about straight ex parte communications.

THE WITNESS: I don't recall having conversations about specific phone conversations. I recall making a comment, I told him I was filing the motion, something to the effect that, yeah, we're still having the same problem.

BY MR. STEPANIAN: Q. Was Sam Foster there when you said that to him?

A. No.

Q. How about from the point of time when you came and you didn't give sufficient notice to Sam Foster, and February 27th—did you tell the Judge anything like that?

A. No, I was too embarrassed.

THE COURT: Will you read that question and answer back?

(Whereupon, the reporter read the last question and answer.)

BY MR. STEPANIAN: Q. You did not ask Judge Marlo or call back Judge Marlo about a search warrant for purposes of searching the premises after the suitcase was opened, did you?

A. No.

Q. You went to a different judge?

A. Yes.

[210] Q. And who was that judge that you went to?

A. Judge Kessell.

Q. Did Judge Kessell ask you whether or not, who was the judge who assigned the search warrant—sorry, the search and seizure condition?

A. I don't know if he asked me or if it was the attorney who was doing the telephonic.

Q. Excuse me, did he ask you?

A. I don't remember having a direct conversation with Judge Kessell.

Q. Okay. Did you have any information from any informant concerning whether or not there were narcotics on that premises prior to going up there on the third of March?

A. No.

Q. How about from other police officers?

A. No.

Q. Private citizens including citizen informants?

A. I had no information about narcotics.

Q. That's marijuana and drugs, too?

A. Had no information.

Q. Same answer?

A. Same answer.

Q. Okay. Mr. Shipp, he's head of narcotics; is he not?

A. Sergeant Shipp is head of Narcotics in Santa Cruz County right now.

Q. In the Sheriff's Office, correct?

A. Yes.

[211] Q. On the third of March?

A. Yes. Yes, he was just transferred in, yes.

Q. He was head of Narcotics on the particular, on March 3rd?

A. Yeah, I think that was about the time he transferred in.

Q. Did Collins say to you, did Mr. Collins call you and ask you, tell you that there was marijuana plants growing on the property of Mr. Merchant?

A. No, he didn't tell me.

Q. Did he expect—was that ever mentioned with Mr. Collins?

A. I don't believe the conversation was with me.

MR. STEPANIAN: I have no further questions.

THE COURT: Any redirect?

MR. KELLEY: Yes.

REDIRECT EXAMINATION

BY MR. KELLY: Q. Tell us your reason for focusing on the Merchant's residence in February of this year.

A. Counsel, I had been having continual complaints coming to either me or through—

MR. STEPANIAN: I'll object to other people.

MR. KELLEY: No way. Hold it. You heard his offer of proof about the bad faith of the D.A.'s Office, why they are focusing on Merchant and trying to use the search clause for other purposes, perhaps marijuana plants, narcotics. It's extremely relevant that the reasons she sought to go up there—this record is going [212] to be reviewed, I am sure; and it's very important that the bad faith be rebutted.

MR. STEPANIAN: Excuse me, your Honor. After I said that to you, you did not then ask any questions after that, so I stopped my questioning at that point.

THE COURT: There has already been testimony. She said she did in fact have complaints and then you objected.

MR. KELLEY: I am not going to belabor it, but I think it needs to be clarified.

THE COURT: I will sustain the objection. I'm not going to allow it.

BY MR. KELLY: Q. Were there any reasons other than neighbor complaints that you sought the clarification; neighborhood complaints about guns being fired?

MR. STEPANIAN: Objection.

THE COURT: I will overrule that objection.

THE WITNESS: No.

BY MR. KELLY: Q. Was it solely Mr. Collins' complaints which caused you to seek the clarification?

A. No.

MR. STEPANIAN: Asked and answered.

THE COURT: I will allow it. Is that your last question?

MR. KELLEY: In that area.

BY MR. KELLY: Q. Were those complaints from the [213] neighbors that you and Pogue received the only reason you wanted to ensure there was an active search clause?

MR. STEPANIAN: I am going to object to this.

THE COURT: I will sustain it. I think she has amply testified. There was ample testimony in this regard. I will sustain the objection.

BY MR. KELLY: Q. When did you first start getting these complaints from the neighbors about the shootings, the firearms?

MR. STEPANIAN: Excuse me, there was no complaint about firearms. That was not testified to.

MR. KELLEY: Then if there isn't, that should be on the record.

MR. STEPANIAN: Look, we have gone into that, your Honor. I don't remember gun, firearms.

MR. KELLEY: Shootings being fired from the area of the Merchant residence.

BY MR. KELLY: Q. When did you start getting complaints?

MR. STEPANIAN: Excuse me.

THE COURT: Why are we getting into this?

MR. KELLEY: Because this is exactly why Counsel is trying to go into it, saying this is a boot strapping situation; we are trying to go in on a drug thing.

THE COURT: I think you're trying to rehabilitate something never established in the first place.

[214] MR. KELLEY: I am laying a foundation for what she does next.

BY MR. KELLY: Q. Did you get those phone calls after the sentencing in this case?

A. I got them prior to the trial.

Q. Did you or Pogue get such calls after sentencing?

A. Yes.

Q. Did you communicate those neighbors' concerns to Mr. Foster?

A. Yes, I mentioned it to him.

Q. Could you tell us those times or time?

A. I recall prior to arguing, us arguing the motion, it was in court and the judge was not on the bench at the time, my making a statement. He was asking me about, you know—

MR. STEPANIAN: Excuse me, this is hearsay.

MR. KELLEY: Counsel has gone into the same grounds about conversations between attorneys. I am entitled on rebuttal to explore those conversations. The record should reflect Foster saying such and such to this witness and her responding. And in fairness, I think we should flush out the whole picture and not let him pick and choose.

MR. STEPANIAN: Let's go. We have been doing very well so far. All I say is that: The conversations that I had were communications that we had at the time of the [215] arrest. I feel that we're going to continue to ask leading questions. Of these questions, all of which are hearsay, I think are not relevant to these proceedings. They had plenty of opportunity to do this at the time the motion to dismiss was had.

THE COURT: I am going to allow the question at this time. Overruled.

BY MR. KELLY: Q. It is the conversation you had with Counsel.

A. Mr. Foster made some query to me as to—

MR. STEPANIAN: This is again hearsay.

THE WITNESS: —as to what the point of the motion, why was I bringing the motion. And I turned and said to him something to the effect of, Sam, you knew

what the problem was. We are still having the problem with the neighbors, the guns are still going off, he doesn't belong with guns. And he commented—

MR. STEPANIAN: I'll object, your Honor.

THE COURT: I will sustain that part.

BY MR. KELLY: Okay, fine, thank you. Did you expect Mr. Foster to have made communication about the existence of a search probation at the time you did your search on Tuesday?

MR. STEPANIAN: That was asked and answered.

THE COURT: Rephrase it.

THE WITNESS: Absolutely.

[216] BY MR. KELLY: Q. Is this the first case you have ever gone into the field on that you have handled?

A. No.

Q. Is it a frequent practice or not?

A. I'd say it's frequent.

Q. Have you gone on executions of warrant that you have written in the past?

A. Yes.

Q. Do you have any vendetta against this defendant?

MR. STEPANIAN: Objection.

THE COURT: I will allow it.

THE WITNESS: No.

BY MR. KELLY: Q. What were you too embarrassed to tell Judge Marlo? I was a little unsure.

A. I was just embarrassed because I had forgotten the ten-day requirement. I was really embarrassed.

Q. Did you or Hopkins handle the telephonic?

A. I talked to [him] about it and [he] set it up, called us back, and I was on the phone listening until Kirkland got on the phone.

Q. Do you have any specific recollection as to when the suitcase was found in all these proceedings? What time of the search?

A. When it was found?

Q. Well, when you first saw it.

A. Yes, but that was much later.

[217] Q. Okay, now, lastly, you had a conversation with Sam Foster on the phone from the house, the Merchant house?

A. Yes.

Q. Now, what did you tell him?

A. Did I tell him?

Q. Did you tell him your purpose for being there?

A. Yes.

Q. And did—what did he indicate about any notice that he may or may not have given to his client?

A. Something to the effect of, well, I didn't have a chance to talk to David yet, and he called a secretary in the background—I think her name is Angie or Andrea or something like that—and said something to the effect that the letter was on his desk.

MR. STEPANIAN: Objection, your Honor. That's been gone into.

THE COURT: Yes, it has.

BY MR. KELLY: Q. Did Sam Foster tell you to go ahead and do the search but limit it to guns?

MR. STEPANIAN: I will object to that. That was a leading question.

THE COURT: All right.

BY MR. KELLY: Q. What did Sam tell you about the search after you explained your purpose for being there?

A. After we discussed the notice and I indicated that we were going to be continuing with the search, he indicated [218] he would tell David to let us search for the guns.

Q. What did he indicate about notice being received? You started to answer that question.

A. He called to somebody in the back room and a woman that I assume was his secretary, and then he got back on the phone and said yeah, yes the letter is still on my desk and is going out today or was going out today, or something to that effect.

Q. Okay, now, you saw the guns that were found, or a lot of them; you testified to that?

A. Yes.

Q. Saw the suitcase Kirkland was fooling around with?

A. Yes.

Q. Could any of those guns fit inside that suitcase?

A. Probably, at least a third of them.

MR. KELLEY: Thank you. That's all.

RECROSS-EXAMINATION

BY MR. STEPANIAN: Q. You mentioned something about a civil writ to Sam Foster during your conversation, did you not?

A. Yes.

Q. Okay, and you discussed the fact that this civil writ, or whatever it was, was for purposes of guns; is that correct?

A. Yes.

Q. Okay, and that was during your conversation on the [219] telephone which Mr. Kelley alluded to?

A. Yes.

Q. All right, he indicated—well, I don't want to get into the notice factor again. I have no further questions.

THE COURT: You may step down.

MR. KELLEY: People rest.

MR. STEPANIAN: Could we take five minutes?

THE COURT: We'll go on.

MS. LEAVITT: He needs to take a personal recess, your Honor.

THE COURT: All right, we'll take a five-minute recess.

(Whereupon, a brief recess was taken.)

THE COURT: People rested?

MR. STEPANIAN: I am just going to ask Officer Shipp a couple questions, your Honor.

THE COURT: Officer Shipp, will you come forward?

* * * * *

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CRUZ
DEPT. A

NO. CR 15,714

THE PEOPLE OF THE STATE OF CALIFORNIA,

v.

DAVID WILLIAM MERCHANT, DEFENDANT.

SUPPLEMENTAL REPORT AND PETITION

April 30, 1981

CASE SUMMARY

On November 14, 1980 the defendant was placed on three years formal probation for violating Sections 417 and 417b of the Penal Code. In addition to the standard conditions of probation the following conditions were imposed:

1. Obey all laws.
2. Serve 18 months in the County Jail with 12 months suspended.
3. Participate in an educational, vocational or therapeutic program as directed by the probation officer.
4. Not possess any firearms during the period of probation.
5. Submit person, vehicle, place of residence to search and seizure at any time of day or night, with or without benefit of warrants as directed by probation officer or any peace officer.

Following imposition of sentence the defendant exercised his right to appeal the judgment of the case. Probation supervision was not provided pending the appeal outcome.

On February 27, 1981 the Court granted a motion for clarification. Pursuant to the Court's ruling the original terms of probation were reinstated and given force with the matter of confinement stayed pending outcome of appeal.

On March 3, 1981 officers of various Santa Cruz County and Federal law enforcement agencies conducted a search of the defendant's residence at 25977 Highland Drive, Santa Cruz, pursuant to the search and seizure clause of the Probation Order. During the search a major cache of weapons, controlled substances, and ether was found and seized. The defendant and his co-resident, Cleo Marohn, were arrested on a variety of felony charges. Please see the attached crime reports regarding the residential search.

It is not alleged that, by virtue of the items seized during the residential search in question, the defendant was in possession of items prohibited to him by the terms and conditions of this probation. This matter is being brought to the Court's and defendant's attention for the purpose of providing formal written notice that this matter has been calendared on April 30, 1981 for arraignment on the alleged violation of probation.

EVALUATION

If the allegations of probation violation are found to be true by the Court, it is apparent that a major probation violation has occurred. Given the nature of the original crime, the defendant's prior criminal record, and the magnitude of the probation violation, it will be recommended that probation be revoked and the maximum sentence imposed.

RECOMMENDATION

It is respectfully recommended in the matter of David William Merchant, Court No. CR 15,714 that if the allegation of probation violation is found true that probation be revoked and the maximum sentence be imposed.

Respectfully submitted,

JAMES W. SOLOMON
Chief Probation Officer

By: /s/ALEX MCTAVISH
Alex McTavish
Deputy Probation Officer III

Dated: April 21, 1981
Dictated: April 20, 1981

Approved for filing:

[signature illegible]
Supervising Probation Officer

The foregoing report has been read and considered by the Court.

Judge of the Municipal Court

Dated: April 30, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CR. NO. 81-0109-SW(SJ)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

WILLIAM DAVIDSON MERCHANT AND CLEO L. MAROHN,
DEFENDANTS.

DECLARATION OF WILLIAM DAVIDSON MERCHANT III IN SUPPORT OF MOTION TO SUPPRESS

WILLIAM DAVIDSON MERCHANT declares:

That I am a defendant in the above-entitled action;

That on March 3, 1981, I resided at the premises known as 25977 Highland Way, Los Gatos, California;

That on March 3, 1981, I had possession of an access card to storage area No. 59 of AAA Mini Storage, and by virtue of said access card I had use of and control over said storage area;

That at the time of the searches of the property known as Old San Jose Road (March 5, 1981 and March 13, 1981), I was doing construction on that property and the property was under my control;

That on November 14, 1980, I was present at a sentencing hearing in a misdemeanor action against me; that I was sentenced by the Honorable John A. Marlo, Judge of the Municipal Court of the County of Santa Cruz, and heard him state that the sentence was stayed pending appeal; that I strongly believed that the verdict was erroneous and would be overturned on appeal; that I did not want to sign the form entitled "Conditions of Probation" but was told by my attorney that I must sign the form in order to get the

stay pending appeal; that due to my belief that probation was stayed pending appeal and due to my attorney's statement, I reluctantly signed the form entitled "Conditions of Probation;"

That after the granting of the stay, I had a telephone conversation with Judge Marlo, who had stayed the sentence; that I told him that I knew I didn't have to comply with the terms of the order since I was not on probation at that time but that I felt that I had a moral obligation to dispose of the weapons; that he responded by saying something to the effect that my feeling was commendable and he in no way contradicted my statement that I was not on probation at that time;

That on March 3, 1981 at around 11:00 a.m., when nine law enforcement officers and Deputy District Attorney Patricia Bazar were at my door and Ms. Bazar told me they were there to do a probation search, I told them that I was not on probation nor subject to search and seizure; that at that time I had received no notification that there was a motion to modify or clarify the stay or that an order reinstating probation had been granted; that at that time I believed as I had previously that the stay of the sentence included the probation and all conditions thereof including possession of weapons and search and seizure.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of May, 1981, at San Jose, California.

/s/ WILLIAM DAVIDSON MERCHANT III

William Davidson Merchant III

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CR NO. 81-0109-SW(SJ)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

WILLIAM D. MERCHANT, AND CLEO L. MAROHN,
DEFENDANT(S.)

REPORTER'S TRANSCRIPT

MAY 21, 1981

REPORTED BY:
WILLIAM R. JOHNSTON

APPEARANCES:

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[3] *May 21, 1981:*

THE CLERK: CR 81-0109, United States versus William Merchant and Cleo Marohn.

State your appearances, please.

MR. STEPANIAN: Michael Stepanian. I am representing Mr. David Merchant, who is present.

MR. PENROSE: John Penrose for the government.

MS. ROSCOE: Nancy Roscoe for Miss Marohn.

* * *

MS. ROSCOE: I move the admission into evidence of G2-A.

THE COURT: It may be received.

(Whereupon, exhibits G2-A, previously marked for identification, were received into evidence.)

MR. PENROSE: Call Mr. Foster.

SAM FOSTER,

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Stepanian:

Q. Mr. Foster, are you a lawyer licensed to practice in the state of California?

A. Yes, I am.

[4] Q. Where are your offices located?

A. Monterey, California.

Q. You are familiar with David Merchant who sits in this courtroom?

A. I am.

Q. Was he your client in a matter that involved a 417 and a 417-B?

A. Yes.

Q. In Watsonville?

A. Yes, that's true.

Q. And this sentencing was in March of 1981?

A. I don't recall the date of the sentencing, but I was present at the sentencing.

Q. You were present along with Mr. Merchant, is that correct?

A. That's correct.

THE COURT: I thought the sentencing was November.

MR. STEPANIAN: Did I say March?

THE WITNESS: You said March.

THE COURT: November of '80 and then the other thing was March of '81.

MR. STEPANIAN: March 3rd.

Q. All right. The trial was approximately October 26th of 1980, is that correct?

[5] A. I don't recall the date. Whatever the records show.

Q. Do you recall there was a sentencing around the fall of 1980.

A. Correct.

Q. After that you received notice from Mrs. Bazar, who was the district attorney in that matter, that there was on a clarification for modification of probation, is that correct?

A. I received notice, that's correct.

Q. Did you communicate in any way this notice for clarification to Mr. Merchant?

A. No, I did not.

Q. After there was some confusion as to the dates in which the motion was filed, is that right?

A. Yes.

My recollection of that is that my secretary did not get it on the calendar. My specific recollection was that a letter came in stating that it had been continued a week. Then I

think the letter of motion may have showed up at or about that time. Then I appeared the second date that the notice—motion was set forth. I think it was a week period of time.

Q. And you came to the court and there was a matter that was before Judge Marlowe, is that correct?

A. Correct.

[6] Q. Was Mr. Merchant present?

A. He was not.

Q. Did he know anything about this motion that was on the calendar?

A. He did not.

Q. And there was a period of time when he received some information about a search taking place, is that correct?

A. That's correct.

Q. Would you describe that to me and what happened? What date was it, do you remember?

A. If you can tell me the date of the search.

Q. Search occurred on March 3rd.

A. It was a Tuesday?

Q. I believe so.

A. I received a call from David indicating that Patty Bazar and some sheriff's officers were at his door and what was going on. I believe at that time I asked him if he had gotten my letter. He stated he had not.

Back up again. I called my secretary in to the office and I asked her to get the file out and asked if we had sent the letter informing David of the hearing and the results of the hearing, because I tried to contact him, I believe, on Friday and was unsuccessful by telephone. She looked in the file and saw a yellow copy of the letter. I told David that I had sent the letter to him and he said he hadn't received it.

[7] MR. STEPANIAN: May I approach the witness?

THE COURT: Was the appeal pending at that time?

THE WITNESS: Yes.

THE COURT: Appeal to the superior appellate division?

THE WITNESS: Right.

MR. STEPANIAN: May I approach the witness?

THE COURT: You may.

MR. STEPANIAN: Q. Would you please look at this letter.

Is that the letter that you referred to in your direct testimony?

A. Well, I hadn't opened it. I thought I had better not. This is my envelope. This has a postmark of March 2nd, 1981. It is addressed to David's address.

Q. This was the only communication you attempted to make to him concerning the reinstatement of his probation?

A. That's correct.

MR. STEPANIAN: May we have that marked?

THE COURT: Yes.

(Whereupon, an envelope with a postmark of March 2, 1981, was marked for identification. D-1.)

MR. STEPANIAN: When did you send this letter on its way?

[8] A. The exact date I can't tell you. I can define the date by the date David was released, because at the time there was a $1 million bail set on David. We had a lengthy hearing in the Superior Court and they got it reduced to $75,000. They only made arrangements to post the bail. He had been released.

I think it was the day he was released or the following day that I stopped by his family home. David was present. They had the letter and they gave it to me.

Q. Will you please open the envelope now. I saved this for Federal Court. We didn't do it in the violation hearing.

If you wish to, Mr. Foster, this is a communication. If you want to assert anything it is all right.

A. This is a letter that I forwarded to David. I noticed on my yellow copy that the date indicated March 3rd. That is a typographical error, because the postmark is the 2nd

and it was mailed on Monday, because my secretary indicated she mailed it.

THE COURT: Keep you voice up.

Anyhow, that purportedly tells about the hearing?

THE WITNESS: The letter indicates, yes, the circumstances of the hearing and that he should be aware of the fact that the probation was in effect.

MR. STEPANIAN: Q. You wrote that letter to give [9] him notice as to the Judge's activity?

A. I dictated the letter on Friday. I have a receptionist who doesn't do the typing. I have a typist that picks up the mail. I assume that's what happened. She picked up my typing on Friday and typed it over the weekend and it was mailed on Monday.

Q. That is the first notice that David received after the 27th—strike that

You gave notice—

MR. PENROSE: Objection. Leading.

MR. STEPANIAN: No questions. Thank you.

THE COURT: He called you over the telephone. Did you read your copy of the letter to him?

THE WITNESS: I didn't recall doing that, Judge.

THE COURT: I thought you said you asked for the file.

THE WITNESS: I was concerned whether or not the letter had been sent out. I recall asking my secretary to give me the file to see if we had a copy of the letter we had sent him. She said there was a yellow copy, which I have given to the lawyer. The yellow copy was there and I said, "David, did you get the letter," and he said no.

THE COURT: Did you tell him the orders include the waiver of search and seizure on the phone as well as the fact you are not allowed to have any guns in your possession?

[10] THE WITNESS: No. The conversation went off in a different tangent. Basically, most of my conversation was with Patty Bazar, Judge Marlowe and some with David.

My main conversation with David was to gather up the weapons. Because you have to understand the context. I was told there was what they call a civil warrant that they had. I didn't know what they meant. I thought what they meant was a writ of execution. What I was trying to tell him to do was take all the guns up and give them the weapons pursuant to that writ.

There was a further conversation with Patty when they were going to do a probation search. I said that is not fair because David had not received notice. That is when I called Judge Marlowe. I don't recall reading the terms of that letter to him.

THE COURT: Now, the hearing on the probation was on February 27th?

MR. STEPANIAN: It was a Friday.

THE WITNESS: It was on a Friday.

THE COURT: You said to him those orders which were entered on Friday after the hearing include the waiver of search and seizure as well as the fact you are not allowed to have any guns in your possession, please make sure that you have no guns at your house, that you are aware of the fact that the residence can be searched. So when you wrote this [11] letter, at least you thought he could be searched.

THE WITNESS: When I wrote that letter, yes, I was relaying the orders of the court that had been made to him.

THE COURT: You had no doubt in your mind that he could be searched and aware of the fact that the residence can be searched?

THE WITNESS: Based upon the orders that were made, that is correct.

CROSS-EXAMINATION

By Mr. Penrose:

Q. Mr. Foster, approximately how far in advance of the February 27th hearing on the clarification motion was it that you received the motion?

A. Well, it's vague in my mind, but my recollection was that the first hearing didn't get on my calendar. The reason it didn't get on my calendar is that my secretary in filing or something didn't get it on. I think that the first notice I got was a letter from the district attorney's office indicating that the motion had been continued.

Q. I think you testified that you received that letter about the same time you received the motion.

A. Something like that. I don't recall exactly the sequence of events. But then after I got the letter, then it got on my calendar.

Q. I take it it would be a little unusual in your [12] experience to receive a letter concerning a continuance of a matter the same day you received the motion that is the original moving paper?

A. That's correct. As I say, I may have missed the original motion. The letter brought that motion to my attention.

Q. You think what may have happened is the motion came in and you did not make note of it and then the letter came in and the letter caused you to look and find the motion that was already there?

A. That's what I believe happened.

Q. It came in how far in advance of the February 27th hearing?

A. Well, this would be—I'm not sure what the time sequence was. It was a week or two weeks between the two motions. But if it was, it would have been approximately the first of the week of the hearing of the motion.

Q. There is a ten-day notice rule that applies in Santa Cruz County, is there not, on motions of this sort?

A. Depends if it is waived or not. Generally speaking, it is not followed very closely.

Q. When the motion came to your attention via the letter or whatever means, you read it, I trust?

A. Correct.

Q. When you read it, what was your reaction to it [13] concerning its merits, concerning how it was going to affect your client's rights and liabilities?

A. Well, this is the thing that is in my mind. I do a lot of criminal work. It is not a major portion of my practice. As I recall, there was no concern in my mind for some reason. If I try to reconstruct, I would be guessing.

Q. Would it have been that the motion basically was not going to change the status quo, as far as you were concerned, he was already on probation?

A. No, I don't believe that was the reason.

Q. What would be an alternative reason?

A. As I told you in my prior testimony, I would be guessing. I can try to reconstruct it, but I think it would be unfair for me to do that. I just wasn't concerned. It is not my practice to do this.

The reason that I felt the motion was well taken is because I felt the appeal vis-a-vis the police officer was really weak. I felt that the appeal versus the other count was the strongest count.

Q. The police officer count, the weak appeal count, was the count on which the probation came down?

A. No.

THE COURT: As far as you were concerned, it wasn't going to change the status of your client insofar as being free on O.R. or on—

[14] THE WITNESS: You have to understand.

THE COURT: Is that right?

THE WITNESS: Give me that again.

THE COURT: Wasn't going to change the status as far as being free or not free?

THE WITNESS: He was going to remain free on bail. I had not had any kind of communication or information at all that David had any communication with the probation office. That there had been no probation communication with him at all.

When I got the notice, I'm telling you I wasn't concerned. It wasn't because I believed—I am clear about that—that that was clear in the Court's mind as to whether or not the probation has been stayed or not. I felt though that my appeal—and I wasn't going to the court and tell them otherwise—on the police officer was a strong appeal against David. The count that he received the jail time on, which was the citizen, I thought it was extremely weak and would eventually be reversed on appeal because there was no evidence of threatening conduct by David vis-a-vis the private citizen.

MR. PENROSE: That is not what I am seeking a response to.

Q. You received a communication concerning your client?

A. That is right.

[15] Q. It was a legal pleading?

A. That is right.

Q. It had the potential, at least, to affect your client's rights?

A. Correct.

Q. In the ordinary course of your practice, I take it, you would feel a fundamental duty to communicate to your client and consult with your client concerning these proceedings?

A. It varies depending on my client and—

Q. You didn't feel you have a fundamental duty to appraise your client that legal papers are filed against him?

A. I have a duty to do that. Whether I perform that duty—

THE COURT: This letter that you wrote which he didn't receive is after the fact of the hearing. Do you recall giving him any notice in advance of the hearing?

A. No, sir, I did not.

THE COURT: You did not?

THE WITNESS: I did not. I didn't give any notice in advance. I made the appearance without David knowing about it.

THE COURT: We have a transcript.

THE WITNESS: What I am saying is what I was saying to the court is I didn't want to tell them that I had what I [16] felt was a strong appeal on that issue versus the police officer. My main concern was to keep him out of jail.

The appeal included the police officer and the citizen. I included what I thought was a very unusual argument vis-a-vis the failure of the judge to sua sponte give the instruction on self defense. I thought that that was a weak issue and I didn't know where the heck it would go. I thought the strongest appeal was on the citizen.

MR. PENROSE: Q. During the time between the receipt of the motion and the letter on the one hand and the February 27 hearing on the other hand you did have at least one phone call that you recall with the defendant, did you not?

A. I recall a phone call from David in that period of time, I think. Now, your phone records will probably show. I don't know what date that was.

Q. You do recall the conversation with him?

A. Yes, but I can't be specific as to whether—

Q. I will ask you one question at a time.

You do recall a telephone conversation with him, do you not?

A. At what period of time?

Q. In this period of time between the receipt of the motion and your awareness of it and the hearing thereon?

A. Okay. I am going to have to tell you that unless you have records to show me specifically when David made calls [17] to me I can't be specific and tell you whether or not I got a call. I did receive calls from David because I represented his family and him on numerous civil matters. I do recall, I think, getting a call from David.

Q. What do you recall was the subject matter of that conversation?

A. I think it was regarding a civil matter.

Q. What is your basis for thinking that?

A. I was representing David on numerous civil matters and he had no notice of this matter, so I imagine he was calling me regarding civil matters. It was *Collins* v. *Merchart* [*sic*] (phonetic). Also his family wanting to sue because of a property deal. His dad and mom were developing some property. I forget where it was.

THE COURT: Don't you keep notes in your file when you talk to your clients?

THE WITNESS: No. Sometimes I do, sometimes I don't.

MR. PENROSE: Q. Did you review those files to determine what this other call might have been about? Was there anything filed in *Collins* v. *Merchart*? [*sic*] Was there anything hanging about the property development matter that would have a bearing to this conversation?

A. No.

Q. Mr. Foster, I will ask you a specific question. [18] Have you made such a review?

A. No, I have not.

Q. You have not done that up to this day?

A. I have given all the files to David's present attorneys.

Q. You testified on this subject once before today and today?

A. That is correct.

Q. At no time up to today have you made a review of those files to determine how your recollection can be refreshed?

A. No.

Q. You have several phone numbers, as I understand it, that you have down in the Monterey area. You have an office number?

A. I have an office number.

Q. What is that?

A. 373–

Q. These questions I am asking you are as to those numbers as of February of 1971.

A. You will have to get clear how these numbers work. I have an office number of 373-8424. I own a peice of property with Judge William Burleigh (phonetic) in Big Sur and that number is in Bill's name and that is 667-2567. I'm there every other four months. Then I have a phone in Pacific Grove. [19] That number is 649-3671.

Q. Is that one listed to you?

A. The Pacific Grove is. The office is. The Big Sur number is listed to William Burleigh.

Q. Do you have any other numbers that you use as of February 1981?

A. No.

Now, I have to draw on my recollection as to whether or not I was—I don't know. I would have to check my calendar as to whether I was living in Big Sur at this time. You see, I trade off with Bill every other four months.

Q. With respect to D-1—

With your honor's permission, I would mark the letter as D-2.

THE COURT: All right.

(Whereupon, a letter was marked as Exhibit No. D-2 for identification.)

MS. PENROSE: Q. Do you in your office have a postage meter?

A. No.

Q. Do you know how it was that that letter came to be typed March 3rd when it has a March 2nd postmark on the envelope?

A. Well, I assume that the typist put March 3rd down. [20] Q. She would have typed that over the weekend, according to your direct testimony?

A. That is correct.

Q. So it wasn't just off by one day, it would have been off by two or three days. On Saturday or Sunday, in other words, she was putting a Tuesday date on that letter.

A. Whatever the date reflects.

THE COURT: That's your signature?

THE WITNESS: No, it isn't. It is my secretary's.

MR. PENROSE: Q. Your secretary signed off?

A. When I'm not around and I want to get correspondence out, yes, it is.

MR. PENROSE: If your honor would indulge me for just a moment.

(Pause in the proceedings.)

MR. PENROSE: Q. Am I correct that your intention in applying for the stay on November 14th was to stay off the execution of the jail sentence?

A. My application for a stay was to stay the jail sentence, that is correct. I applied basically, but all I did was apply for bail pending appeal, which he is entitled to as a matter of right in a misdemeanor. The judge released him on his o.r.

MR. PENROSE: I have nothing further.

[21] **REDIRECT EXAMINATION**

By Mr. Stepanian:

Q. You attempted to inform David as to the potential that he was subject to a search and seizure clause?

A. The reason I put—my specific reason for sending the letter to David was to inform him of this motion and that these conditions are now applicable to him and that he should be aware of the fact that now he could be subject to that. That's the reason I wrote the letter.

Q. Is it fair to say that prior to that time your belief was they were not applicable to him?

Let me put it this way: Did you ever write any other kind of a letter to him?

A. No, I never wrote another letter like that.

Q. Telling him you have got to be aware that you shouldn't have things like this in your residence and that the fact is your residence could be searched?

A. No. This whole thing came down—I was really upset about it. So I didn't even—I couldn't recall if he even signed the probation thing. So I went and checked that.

THE COURT: And he had?

THE WITNESS: I went to the file and I looked and I saw his signature. I was concerned as to whether or not he had actually signed it.

MR. STEPANIAN: No further questions.

[22] THE COURT: Thank you.

MS. ROSCOE: No questions.

THE COURT: Any need to recall District Attorney Bazar?

MR. STEPANIAN: Let's confer.

(Pause in the proceedings.)

MR. STEPANIAN: Two questions.

Q. Mr. Foster, did you ever write David Merchant to tell him that the probation conditions were in effect?

A. No.

THE COURT: Did you ever tell him they were not in effect?

THE WITNESS: No. I just said everything was stayed. That's all.

MR. STEPANIAN: Q. Why did you write this letter? First of all, you wrote it after the hearing in court.

A. Because I didn't believe David knew what the status of this thing was and I wanted to inform him that the judge had indicated that he was making it clear that the probation had—the search and seizure things had come into effect and he should know about it as quickly as possible.

Q. When did you feel they came into effect?

A. When I wrote that letter. That's why I wrote it.

Q. Did you have a conversation with Judge Marlowe?

A. I received a call from David. I talked to [23] Patty Bazar. My phone records will indicate. So I called Judge Marlowe, who was the sentencing judge, and I got him and I told him what I felt was going on was really unfair

because I had failed to give my client notice and that he told me he had not received my letter. Judge Marlowe indicated he would call and talk to them.

I felt that that probably wouldn't happen because of the fact that they were presently searching the residence. So I called the D.A.'s office in Santa Cruz and had the D.A.'s office receptionist call the home of David and inform him to have Patty Bazar call Judge Marlowe. I didn't know if they did it or not.

MR. STEPANIAN: I have no further questions.

THE COURT: Okay. You may be excused.

Any questions?

MR. PENROSE: Yes, your Honor.

RECROSS-EXAMINATION

By Mr. Penrose:

Q. I am not sure what you said. What I want to find out is what you thought about this.

A. I said I thought they were in effect as a result of the hearing.

Q. The language that you used in the letter—I will quote it to you—"Basically the District Attorney wanted to maintain the probationary order as active on the first count. [24] The court ordered that the probation remain effective pending the appeal."

Now, in using that language, was it your understanding that the probationary order was in effect all along?

A. No. The reason that I wrote the letter was that because Judge Marlowe indicated that it was not effective. That is what he stated in court. My choice of words may not have been appropriate.

Q. Did you have any conversations with David concerning firearms and the possession of firearms from the time of the sentence until addressing this letter to him?

A. There was a conversation that I had and it was regarding a firearm that showed up in this trial. This weapon evidentally.

Q. Which trial?

A. The trial of the misdemeanor. This weapon evidentally—and this is a general recollection some time ago—had been involved in a prior—

MR. STEPANIAN: I would object to this line of questioning. Again, this is going back to some weapon in the past.

THE COURT: Yes.

Subsequent to the sentencing, did you talk to David about the firearms in his possession?

THE WITNESS: In his possession, Judge? Can I [25] explain what I talked to him about?

THE COURT: It was after the sentencing?

THE WITNESS: Yes, sir. But it was regarding a fact that this weapon had been involved in a prior minor misdemeanor involvement. Evidently, Judge Marlowe had ordered that the attorney that David had, which is a long time prior to my becoming involved with him, sell the weapon. It ended up with David. That's on the record during the sentencing.

Then I had a conversation with Ashly (phonetic) saying he wanted to talk to David about that gun and Judge Marlowe indicated he wanted to have that thing investigated of what that attorney did. If he had done a phony sale, I guess. Then there was a few conversations with David, because I think David then talked to the attorney in Santa Cruz that had represented him in the past.

So I did talk to him about that weapon, but not about him having guns in his possession.

THE COURT: Did you know he had a gun collection?

THE WITNESS: I knew he had a gun collection prior to the jury trial, because I had been to his home and had seen a case. I'm not sure if it was pistols or it was—I am not a gun expert—or rifles.

THE COURT: Okay.

MR. PENROSE: Q. So your answer is you had one conversation with him from the time of the sentencing until

[26] the time you addressed this letter to him and that was on the subject of a gun that had come back from an earlier minor misdemeanor?

A. No. I had maybe two or three conversations. I don't know. Several conversations with him about this, because it was a continuing discussion between the police officers, myself and the court.

Q. You had several conversations with him confined to that firearm, is that a fair summary?

A. No, I had some other things with him, some civil matters, too.

Q. I am talking about firearm conversation.

A. That is about all I can recall. I don't think I ever discussed with him whether he should or should not be in possession of them.

Q. You don't recall having any conversations about whether he should or should not possess firearms?

A. No. I would be guessing. The only thing that sticks in my mind is that pistol.

MR. PENROSE: Nothing further.

MR. STEPANIAN: Nothing further.

MR. PENROSE: If counsel does not wish to, I would move the admission of D-2.

MR. STEPANIAN: Yes. Those are our exhibits.

(Whereupon, Defendant's exhibit No. D-2 was received into evidence.)

[27] THE COURT: Your next witness.

MR. PENROSE: May I release Mrs. Bazar?

MR. STEPANIAN: Yes.

THE COURT: Yes.

PHIL E. KIRKLAND

called as a witness on behalf of the government, being first duly sworn, testified as follows:

THE CLERK: State your full name and spell your last name.

THE WITNESS: My name is Phil E. Kirkland, K-I-R-K-L-A-N-D.

DIRECT EXAMINATION

By Mr. Penrose:

Q. Sir, what is your employment?

A. I am a Detective Lieutenant for the County of Santa Cruz, Sheriff's Office.

Q. How long have you been a Lieutenant there?

A. I have been a Lieutenant for three years.

Q. How long have you been in the Sheriff's Office in Santa Cruz?

A. Eight years.

Q. I want to direct your attention to Friday, February 27th, 1981.

On that day, did you have any conversations with anyone concerning a proposed search of a Highland Way property [28] belonging to or occupied by William David Merchant?

A. Yes, sir, I did.

Q. In general, what were those conversations?

A. In general, the conversation was between myself and Sgt. Robert Shipp of our department. He alerted me to a search situation on the summit and very briefly described the details surrounding it.

Q. Did the conversations that you had that day include a recitation of any prior complaints from neighbors about Mr. Merchant on that property?

A. I was informed by Sgt. Shipp that some complaints had been received with respect to shooting guns and making threats and—

MR. STEPANIAN: Excuse me. I would like, if it is going to get into that general—

THE COURT: Overruled.

MR. PENROSE: Q. Go ahead.

A. Gunshots, noises and threats were the contacts.

THE COURT: Who advised you of that?

THE WITNESS: Sgt. Robert Shipp.

MR. PENROSE: Q. The following week, did you organize a search party to go up to conduct a search of that premises?

A. Yes, sir.

Q. What was the basis on which you were going up to [29] make the search as you understood the situation at that time?

A. As I understood it, at that point, my information was from Mrs. Bazar, the District Attorney's office, the search would be conducted for weapons in violation of a probationary order by Municipal Court in Santa Cruz County. In addition, this was in conjunction with a writ of civil attachment, which was in the amount of somewhere around $15,000, which included the firearms and a bulldozer.

Q. At what time did you arrive at the premises?

A. Roughly 11:00 a.m.

Q. This was on which day?

A. This was on Tuesday, March 3rd.

Q. Who did you have along with you from the Police Department or Sheriff's Office or any other person in an official capacity?

A. Well, let's see. There was Sgt. Shipp, myself, Deputy Robert Tanner from our I.A.D. section, Deputy Augi Granco from our civil section, a civil process server, whose name I do not recall, Deputy Jessie Valdez from the Sheriff's metro unit, Officer Randy Schuler from the Santa Cruz Police Department, who is detached and assigned to the Metro Unit. There may have been a couple more, but I don't recall right now.

Q. Describe for us how the search initiated.

A. I directed the officers at the scene to take up [30] various positions around the house for our safety. Sgt. Shipp and I believe Deputy Tanner went up to the front door and knocked on the door.

A. At the time the knock on the door occurred, what were the objectives of the search? What was it that you understood you were authorized to look for and to seize?

MR. STEPANIAN: Excuse me. That's a compound question.

THE COURT: Break it down.

MR. PENROSE: Q. What did you understand that you were authorized to look for and seize at that point?

A. Firearms.

Q. The knock on the door occurred. Tell us what happened then?

A. A woman appeared at the door after a minute or so. She later was identified as Mrs. Marohn, Cleo Marohn.

Q. Then what happened?

A. We told her who we were, purpose for being there, and asked if David was home, and she said he was. She went to get him.

A short time later, David appeared at the door.

Q. Continue on.

A. We told David our purpose in being there.

THE COURT: What was your purpose?

THE WITNESS: To search for firearms, your Honor.

[31] THE COURT: You didn't talk about the civil writ of execution?

THE WITNESS: We did also mention that to him. Both issues were addressed.

He became very excited. He asked to call his attorney.

Prior to calling his attorney, I should say, that one of the deputies at the other side of the house said, "I can see a gun. It looks like an M-16 in the house."

We asked David to pass the gun out to us, again in concern for our safety, and he did. It turned out it was an R-15, which is identical in appearance to an M-16.

Thereafter, David asked if he could, as I was saying, call his attorney. I said that he could call his attorney, but he then indicated that he would have to leave the room to get the telephone number.

I did not permit that. Deputy Tanner, who was known to Mr. Merchant previously, went and escorted him to get the telephone number. David then called his attorney. A conversation of some time took place.

MR. PENROSE: Q. In the meantime, you are all waiting where?

A. All waiting out in front there. I think Tanner remained in the house with him.

At some point in time—and I can't say exactly, [32] two minutes or three minutes or four minutes—but I just determined the process was taking too long. It was a large house. I didn't know if anyone else was in there.

I said enough. We are going to be coming in now. We did come in.

Q. Did you begin your search at that point?

A. Well, not immediately. Firstly, Mrs. Bazar from the District Attorney's Office engaged in a conversation with the person I was told was Sam Foster. There was some interchange between he and her. And after that we began our search.

Q. Where did you stay during the first ten or so minutes during the search?

A. I personally remained in the living room area.

Q. To the extent you were able to, did you observe where the other people went in the house?

A. They headed toward the middle of the house, which was, as it turns out, leads up to the upstairs and to the basement and so on and so forth. David was asking us if he could get the guns and bring the guns to us, and I declined that offer.

Q. After you were there for a specific period of time, did anything come to your attention by way of seizeable items other than firearms?

A. Yes, sir.

[33] Q. Tell us about that?

A. A number of things came to my attention almost simultaneously. One—and I don't mean to be in order of occurrence because they were very nearly simultaneously—Officer Schuler brought to me a suitcase and he said the suitcase is full of qualudes. I told him to open it. I examined the contents previously and saw a large quantity of silver packaged sealed items marked qualuda, Mexican qualudes. Also the area that I was standing in, the living room, was at a doorway which leads both to a room that had been converted into something of an office. In any event, there was some filing cabinets in there and a bathoom and I could smell a strong smell of ether. In fact, I asked Mrs. Marohn what the ether was for and she said, "I don't know, maybe cleaning machine parts."

About that same time, Sgt. Shipp came to me and said he had discovered a basement wherein allegedly there was none. There was a question directed to Mrs. Marohn was there a basement to the house and she said no. I was there.

Sgt. Shipp said there is a basement down there and it is full of chemicals. There is hundreds of gallons of ether down there.

About the same time, officers came down from the upstairs bedroom and reported to me that there was another room up there which appeared to be full of chemicals and lab [34] equipment and asked me if I could come up and take a look at them.

MR. STEPANIAN: Pardon me. I would ask right now and make a motion as to hearsay statements. I assume that there are for purposes of probable cause only and I will make the objection at this time.

THE COURT: Okay.

MR. PENROSE: We are here on a suppression hearing. It is all for probable cause.

Q. You may continue to recite the hearsay.

A. I went up the stairs and I looked in this room which contained a very large quantity of lab equipment along with something growing or some sort of peat moss in

boxes and cartons. Again, all this was happening pretty much concurrently.

My attention was directed to another bedroom upstairs, which was the southwest bedroom. I think Mr. Merchant's bedroom. Somebody said there is a lot of money in here. He said you better take a look.

I went in and I was directed to three locations. One was a chest of drawers against the wall—it would be the southerly wall—and I saw in there a paper bag in which the top was open. I don't know if it could have been closed, because it was so full of money. It may have been able to be closed.

[35] Q. This was what size bag?

A. It was between what would commonly be a lunch bag and a full-size shopping bag.

Q. In between?

A. I looked in the end of it and it was stashed with wrapped $100 bills, as far as I could see into the bag. I then went—I was directed to a small dresser next to the table, a bed stand. There was a stack of $100 bills in the bed stand going down to the bottom of the bed stand.

I then looked in another dresser, which was located on the eastern wall of the residence in that same bedroom, and there was another bag.

THE COURT: Subsequently counted?

THE WITNESS: Yes, sir.

THE COURT: Counted by Internal Revenue Service?

THE WITNESS: Yes.

THE COURT: How much was it?

THE WITNESS: I can't tell you the exact figure, but I think it was around $360,000.

In any event, there was another bag. Not very good condition. Sort of shredded. There was packages of 20's, 50's and 100 dollar bills.

Also in that room I observed an infrared scope on a tripod. It was not mounted on a weapon. It was a military surplus item. There was a number of guns in the house.

[36] MR. STEPANIAN: Objection.

THE COURT: Sustained.

MR. PENTROSE: Lt. Kirkland, going back to the first item that you talked about occurring in this more or less simultaneous investigation, that is, the suitcase or briefcase with qualudes in it. Would you describe for the court the suitcase or briefcase, whatever it was.

A. It was a standard size luggage tourister, if you will, type of suitcase. Perhaps roughly 30 inches by 24 inches somewhere in that neighborhood. Standard size suitcase. Not especially large and not small.

Q. Do you know how many qualudes were inventoried out of that suitcase?

A. Approximately 1500.

Q. How were they wrapped?

A. They were wrapped in bindles [*sic*] of, I believe, 50.

Q. 50 per package?

A. Yes.

Q. And the wrapping was what material?

A. Are you referring to the packaging material or the wrapping to hold the bindles [*sic*] together?

Q. Describe the whole thing.

A. The qualudes themselves were in tinfoil, metal foil, and I can't honestly recall what held them together. I think string or rubber bands.

[37] Q. Did you handle any of these packages?

A. Yes, I did.

Q. Were you able to determine the weight of them from handling them?

A. Each one weighed several ounces.

Q. And the quantity of such packages would be approximately what?

A. I am sorry?

THE COURT: Said 1500 wrapped in bindles [*sic*] of 50 each.

MR. PENROSE: Q. Do I infer from that there were 30 some?

A. Yes.

Q. Each one with its own metallic foil wrapping?

A. They were packaged individually and then wrapped in a group.

Q. Can you give us any estimate at all of the weight of the contents of that suitcase?

A. Well, as I say, each group of 50 weighed several ounces. Multiplied out, that would be—

Q. Couple pounds, three pounds?

A. Something like that.

Q. In your experience with handguns in your career as a law enforcement officer—

A. Yes.

[38] Q. —would two or three pounds be within the weight range of a typical handgun?

A. Yes.

Q. After the discoveries that you have just recited, what did you do?

A. I sealed the residence and I spoke to Mrs. Bazar and said I wanted a telephonic warrant as quickly as possible. Told Sgt. Shipp to direct people to stop searching and meet me downstairs.

Q. What time was this that you froze the premises?

A. I'm going to estimate, Sir, that it was around noon, maybe before.

THE COURT: Around noon, your Honor.

Also, I placed David and Cleo under arrest and had them sitting on the couch in the living room there.

MR. PENROSE: Q. Were they removed from the premises shortly thereafter?

A. They were.

Q. Did you rapidly acquire the telephonic warrant that you sought?

MR. STEPANIAN: I object.

THE COURT: Tell us when you got it. How long did it take?

THE WITNESS: Three hours and thirty-six minutes.

THE COURT: What did you do while you were waiting?

[39] THE WITNESS: I sat in the front room. I argued with the District Attorney's Office.

MR. PENROSE: Q. What were the causes of the delays?

A. The causes of the delays were the first attorney I spoke with didn't want to do a telephonic warrant. The second attorney I spoke to, unfortunately, it had gone into the lunch hour. Could not find any attorneys or any magistrates. This went on until after 10:00.

I went into the procedural aspects of setting up the attorney going down to the magistrate and explaining the situation, the mechanics of setting up the conference call and the other peripheral mechanics involved, and ultimately doing the tape recording.

Q. At 3:30 you got a warrant from which judge?

A. Richard Kessell.

Q. How long did it take to completely execute that warrant?

A. Three days.

Q. In the course of executing that warrant, were certain documents seized concerning a person named Steven Tomsen?

A. Yes.

Q. What were those documents?

THE COURT: Can we have a stipulation that he [40] found these documents with the name on it and checked it out and so forth?

MR. STEPANIAN: Yes.

MR. PENROSE: Q. What were the documents?

A. Business cards, various receipts for different items, and most notably a receipt for a rental on a mini storage in Santa Cruz.

Q. Was that any effort to identify and find Mr. Tomsen?

A. We ran a computer check on the name as spelled, T-O-M-S-E-N. There were no records on file in the state of California DMV-CINI files, so on and so forth. We had no local information. No state information on the name.

Q. Was that followed up by investigation, plus the documents that were found, the basis for an application for yet another warrant?

A. Yes, Sir.

Q. For the mini storage?

A. Yes.

Q. What was found in the execution of that warrant?

A. I didn't execute the warrant. I understand Officer Piperidine did.

MR. STEPANIAN: I will object to that conclusion was.

THE COURT: Sustained.

[41] MR. PENROSE: I have nothing further.

CROSS-EXAMINATION

By Mr. Stepanian:

Q. Did you have a conversation with Mrs. Patty Bazar on Friday before the search took place?

A. I think that I did, yes.

Q. Did she indicate to you that a motion was granted to reinstate probation of David Merchant?

A. Yes.

Q. And upon her saying that, did she indicate to you that she wished to search the residence on Highland Way in Santa Cruz County?

A. Yes.

Q. And this was on a Friday. When was the earliest time that you indicated to her that you could make this search?

A. As far as I recall, Mr. Stepanian, we put the search off until Monday morning.

Q. There was a reason for that?

A. Yes. overtime.

Q. On Monday, did you again have a conversation with Mrs. Bazar concerning the mechanics of this search?

A. Very briefly. I was very busy on Monday.

Q. There was, I believe, some testimony of some homicide which you were investigating or your office was [42] investigating?

A. There had been a homicide on Sunday. I was busy making assignments with respect to that case.

Q. Your put her off in some respects to some later time to make this search based on your manpower problem, correct?

A. Correct. I was dealing primarily, Mr. Stepanian, with Sgt. Shipp.

Q. So whatever the case may be, on Friday there was an overtime problem. On Monday there was the homicide and a lot of work in the office. On Tuesday the search came together is that correct?

A. That's correct.

Q. So Mr. Shipp—who was a sergeant?

A. Yes, Sir.

Q. —was your Liaison with, for want of another word, with Mrs. Bazar at the District Attorney's Office, is that correct?

A. Yes, Sir.

Q. And you, along with several officers that you mentioned, went up to the residence, is that correct?

A. Yes, Sir.

Q. And that's Lt. Kirkland, Shipp, Ruiz (phonetic), M. Wilder (phonetic)—who was there?

A. Right.

Q. Deputy Franco (phonetic), Patty Bazar, [43] Deputy Barden (phonetic), Willdley (phonetic), Bochec (phonetic) Hartness (phonetic), Deputy Gardner, Deputy Wallace (phonetic) Deputy Persley (phonetic), Deputy Tanner (phonetic) Sgt. Morris (phonetic), Sgt. Weaver

(phonetic), Deputy Valdez (phonetic), Officer Schuler (phonetic), Jay Ashly (phonetic), C. Cook (phonetic), J. Martin (phonetic), J. Dove (phonetic), and S. Schilling (phonetic),

That was a list of the people who were present up there?

A. No, Sir. To make it easier, that's the group of people that were there over a three-day period.

Q. Those were the people there over the course of three days?

A. Yes.

Q. That was the force that was there making searches pursuant to the warrant. Some of these people that were testified to were there prior to the telephonic warrant, is that correct?

A. Correct.

Q. Do you know when J. Martin—strike that.

Do you recall if J. Dove from the IRS arrived?

A. No, I do not remember if that was the first or second day.

Q. How about Mr. Martin from D.E.A.?

A. I think he arrived late the first day. Again, I [44] am not sure.

Q. The warrant was called in at approximately 3 o'clock, correct?

A. Yes, Sir.

Q. And the warrant was finished at approximately 3:30, is that correct?

A. 3:36, I believe it was.

Q. I am going to show you a copy of the warrant and ask you to look at it and tell me whether or not that was the warrant in question that you called in.

(pause in the proceedings.)

MR. STEPANIAN: Q. There is some handwriting on that warrant which you did not write, is that correct?

A. That's right.

Q. Would you peruse that warrant and determine for me if this was the warrant in question?

A. This is the application for the warrant.

Q. This was then returned to you sometime during that day of March 3rd, is that right?

A. Yes.

Q. The arrest of Mr. Merchant and Mrs. Marohn took place approximately 11 o'clock or thereabouts on March 3rd?

A. No, I would put it closer to 12:00.

Q. Do you recall a woman named Kathy Kelley (phonetic) a sister of Mr. Merchant, coming to that residence?

[45] A. Yes, Sir.

Q. Approximately what time did she arrive?

A. I do not know what time she arrived. I don't know if she got there before or after Mr. Merchant and Mrs. Marohn were transported.

Q. Would you say it was close in time to the noon hour or the time in which they were arrested?

A. I honestly don't remember what time she got there.

THE COURT: When they were arrested, where were they taken to be booked?

THE WITNESS: To Santa Cruz County.

THE COURT: Mrs. Kelley arrived before or after?

THE WITNESS: That's what I'm trying to recall. It was somewhere close to the time they were transported.

MR. STEPANIAN: Q. It was close to the time in which they were transported than the time in which the warrant was applied for?

A. Yes.

Q. Now, how long did Kathy Kelley stay there, please?

A. Quite some time. She sat out by the swimming pool talking to me.

Q. Did you notice whether or not she walked around the area?

A. No. I was in and out of the house, of course. I only spoke to her by the swimming pool. I think her father [46] also arrived there at some point in time.

Q. The answer to the question is that you do or do not recall her wandering around or moving around that area?

A. I do not recall her wandering around.

Q. Incidentally, that is an unincorporated area of Santa Cruz, which allows firearms to be discharged, is that correct?

A. Insofar as I know, yes, it is unincorporated. As far as I know, this was a shoot zone.

Q. This was, to your recollection, a shoot zone?

A. A shoot zone.

Q. Are you familiar with when dove season begins?

A. No, sir.

Q. Now, while you were there, many of the officers, did they stay in one place from the point in time that Mr. Merchant was arrested? Were there officers that went to various portions of that premises?

A. At what point in time?

Q. From 11:30 until 3 o'clock when the warrant was applied for?

A. I directed the officers to quit searching.

Q. At what time?

A. At the time that all those items that I described to you happened. That would have been right close to 12 o'clock.

[47] Q. Now, at approximately 12 o'clock you told them to quit shooting—strike that.

A. We never shot.

Q. I understand that.

Was Merchant in one place, David Merchant, or was he around the area?

A. Before his arrest?

Q. Before his arrest?

A. He was endeavoring to roam around the house. I was endeavoring to have him not do that.

Q. It is a fact, is it not, that certain weapons were handed to you by him?

A. To me?

Q. No, to officers. The AR-15 was handed to officers by Mr. Merchant?

A. I didn't see him handing any of the guns.

Q. You were approached by an officer who came from one portion of the residence to the downstairs area and showed you a suitcase, is that correct?

A. Right.

Q. Did he indicate to you how that suitcase was opened?

A. No, Sir.

Q. Did it appear as though it was opened with a key or did it appear as though it was opened—

[48] A. I didn't notice any signs of force. So I assume it was unlocked.

Q. It was closed when it was handed to you, isn't that right?

A. It sat on the floor in front of me closed.

Q. When it was sitting on the floor and you looked at it, did you know what was inside of that, if you were not told that qualudes were in there?

A. Would I have known what was inside? No.

Q. When that paper bag was handed to you, it had some currency in it?

A. It wasn't handed to me. It was shown to me in a drawer.

Q. Was that in a drawer that was opened or closed?

A. Opened.

Q. It was opened by a police officer?

A. I assume so.

Q. When you looked at that, did it appear that there was anything else besides money in it?

A. Which bag are you referring to?
Q. The first bag you saw.
A. I don't recall seeing anything except cash.
Q. Did you touch the outside of the bag?
A. No.
Q. Was the bag opened when you get there?
[49] A. Yes.
Q. You don't know in what state that was prior to it being searched, is that correct?
A. No.
Q. Did you open up any drawers?
A. No.
Q. Did other officers open up drawers?
A. At what point?
Q. During the point prior to your telling them not to search any more.
A. Yes.
Q. Drawers were opened, closets were gone into?
A. Yes.
Q. The rooms in the house were gone into?
A. Yes.
Q. There was an open search going on, is that correct?
A. Yes.
Q. There wasn't as far as you were concerned, a directive from you limiting the scope of the searches except for the fact that they were looking for weapons, is that right?
A. My instructions to the search team in the house, echoed by Mrs. Bazar, were we are limiting this search to firearms.
THE COURT: How many firearms did you find?
THE WITNESS: Approximately 80, your Honor. 78, I [50] think, somewhere in there.
THE COURT: Were they all located in one place?
THE WITNESS: Throughout the building.
MR. STEPANIAN: Q. Most of the weapons were in one area, isn't that correct? This is a room off the bedroom.

A. I am not sure what you mean by most, counsel.

Q. Let's say there was approximately 70 weapons.

A. No, I don't think that's true. I would have to look at the evidence and photographic reports.

Q. You do no know where the weapons were found?

A. No. But I had people coming to me saying there are guns all over the place.

Q. And they were brought to you, isn't that correct?

A. That's right.

Q. And they were piled on a table?

A. That's right.

Q. These weapons, some were fairly expensive weapons, is that right?

A. Yes.

Q. And many of them were in good condition?

A. Yes.

THE COURT: Handguns and rifles?

THE WITNESS: Handguns, rifles, shotguns.

THE COURT: Automatic?

THE WITNESS: No.

[51] THE COURT: Machine guns?

THE WITNESS: There were no machine guns.

THE COURT: Collector items or just—

THE WITNESS: Collector items but not antiques. There were a few old guns, but they were not antiques.

MR. STEPANIAN: Q. This was a collection of guns?

A. This was a collection of lots of guns.

Q. Different types of guns, different categories of guns, is that correct?

A. Yes.

Q. These were in good condition?

A. Some were, some weren't.

Q. But by and large, this collection of guns was in fairly good shape?

A. By and large.

THE COURT: You say they were mostly operational?

THE WITNESS: I assume they were all operational.

MR. STEPANIAN: Okay.

Now, at one point these weapons were placed on the table in front of you and they grew to about 40 or 50 or them?

A. They grew onto the floor.

Q. 40 or 50 of them?

A. That's correct.

Q. These were rifles, handguns, et cetera?

A. That's right.

[52] Q. It is fair to say, is it not, that within about half an hour a lot of guns were put on that table?

A. That's fair to say.

Q. You've been an officer for how long?

A. Eleven years.

Q. And you have had experience in the sheriff's department with guns, is that correct?

A. Correct.

Q. Would it be fair to say that this pile of guns on the table—

How long was it before 30 to 40 were on the table, would you say, fairly rapidly?

A. 40 minutes.

Q. How long was it before the qualudes were found?

A. 50 minutes.

Q. So at least there were 40 guns or so at the 40-minute period.

When you were looking at those guns, just between us now and your expert—

A. Just between us?

Q. Sorry.

Would you say they were worth in excess of $15,000?

A. I would say that.

Q. Now, the qualudes were found after those 40 or 50 guns were found. That's at the 50-minute mark. That takes us [53] approximately to what time?

A. Ten to 12:00.

Q. Mr. Merchant had been sent away at that point?

A. No.

Q. You say 12:00.

A. He was arrested at approximately 12:00. It took a few minutes to get him transported out of there. Whatever time on his booking slip.

Q. Would it refresh your recollection to indicate that the booking slip indicates that he was booked into county jail at 11:30?

A. Let me take a look.

Q. All right. Sometime before 12:00 he was taken from the residence?

A. Somewhere around 12 o'clock.

Q. Now, you attempted to get the warrant before these problems occurred, whether it was going to be telephonic, whether someone is going to go down and get it, at that point was Merchant in the residence?

A. No.

Q. Was Mrs. Marohn in the residence?

A. No, Sir.

Q. Mrs. Kelley was outside?

A. Yes. At some point in there she arrived.

Q. And there was sufficient manpower in there to [54] freeze the residence, is that correct?

A. Yes.

Q. And at that point where you first determined that you wished to warrant, what, you had found the qualudes?

A. Qualudes.

Q. Did you find the qualudes before or after you wanted to get the warrant?

A. Before.

Q. The guns?

A. Some guns.

Q. Most of the guns, as it turns out?

A. Many of the guns.
Q. And some bills?
A. Yes, sir.
Q. Money?
A. Money.
Q. Where was the money taken?
A. To the treasurer's vault at the county of Santa Cruz.
Q. Who had control and custody of that money at the point that it left the house?
A. Who had responsibility for the money? It would certainly have been me.
Q. Who counted it?
A. The Internal Revenue Service in part and we did in [55] part.
Q. When did it leave the residence?
A. As it turns out, there were five locations where money was secreted. The first three left that night.
Q. With the Interal Revenue Service man?
A. No. With the property people from the sheriff's department.
Q. Was it counted there?
A. No, it was not counted. It was sealed and countersigned four times and placed into our safe.
Q. So you are saying before it was placed in the safe it wasn't counted, that is, the first caches of the money?
A. Correct.
Q. These were in paper bags?
A. Two of them were. One was not.
THE COURT: These are interesting matters, but they're sure time consuming.
MR. STEPANIAN: This is something in dispute that will bear directly on the problem.
Q. Let me go through this then.
You applied for a warrant and you indicated in the warrant that there were certain chemicals that were seized which you related to the magistrate.

A. That's correct.

Q. And these were the lab equipment?

[56] A. Yes, Sir.

Q. A large quantity of chemicals, lab equipment and unlawful drugs; it that correct?

A. Yes.

Q. And then you indicated—and you were more specific on page 4—as to what the drugs were you found? Here is a list of the drugs there.

A. Yes.

Q. Those were the specific chemicals that you found?

A. Yes.

Q. You don't indicate how much of the chemicals in this warrant?

A. Well, I didn't know how much.

Q. Then there was a physicians desk reference, is that correct?

A. Yes.

Q. The RCBS 10-10. That is a scale. Where was that found?

A. I believe it was on the table in the dining room area.

Q. Isn't it a fact that that is a company that specializes in scales for purposes of loading cartridges of powder for firearms?

A. I do not know what that company specializes in.

Q. It is a fact, is it not, that there was powder and [57] firearm loading equipment in the vicinity of that scale?

A. Yes.

Q. When you walked in, do you recall David Merchant saying, when you indicated the purpose of why you were there, that, "I am not on probation," you recall him saying that?

A. Yes.

Q. You had been in communication with Mrs. Bazar during the course of these days, is that correct?

A. She was with me.

Q. The telephonic warrant—

Why don't we mark this telephonic warrant. Exhibit A is the telephonic warrant.

(Whereupon, a telephonic warrant was marked as exhibit "A" for identification.)

MR. STEPANIAN: Q. This is the warrant in its entirety?

A. The application. I haven't gone all the way through it.

Q. Why don't you look through and see if that is the actual total warrant.

A. It appears to be complete.

Q. So this is the communication you had via a telephone with Judge Kessell which gave you the writ, you believed, to continue your search; is that correct?

A. Yes.

[58] Q. What time did you say that you asked that the search cease, approximately, if you can recall?

A. Noon. Right around noon.

Q. Was there any officers that came to that residence subsequent to 12 o'clock.

MR. PENROSE: Objection, your Honor. Over what period of time? Next three days?

MR. STEPANIAN: I am not sure.

Q. On March 3rd there was an order there be no more searches. However, did you notice whether any officers came to that residence subsequent to 12 o'clock? That means arrived.

A. I understand that.

Again, It is a little difficult to answer. Are you more interested in the hours after? Five hours?

Q. That is a good point. I mean from 12 o'clock until the application of the warrant.

A. I don't think any additional officers arrived.

Q. How many were there at that point?

A. Eight or nine officers.

Q. Now, where were these officers stationed?

A. Well, four or five were in the front room with me. Some were outside out of sight.

Q. Do you know whether or not any of those officers while out of your sight went to the barn?

[59] A. I do not know, but it would have been contrary to my instructions.

Q. You instructed them not to go into the barn, but you don't know whether they went in there or not?

A. No, Sir.

Q. Isn't it a fact that you received information prior to 12—strike that.

Did you receive any information from the point in time that you arrived on that premises on March the 3rd until you applied for the warrant at 3 o'clock as to what vehicles or property was inside the barn? This is a barn that's near the area.

A. With respect to the barn, the only communication I recall during that period was it looked like it was a workshop and there was a rusty can of old test tubes lying on the walkway to it.

MR. STEPANIAN: I move to strike that as nonresponsive. I am talking about inside the barn.

THE WITNESS: No. My answer stands. I was told it looked to be a workshop. Perhaps that refers to things around or inside the barn. But I was never told what was inside the barn.

MR. STEPANIAN: The only information that you received was that apparently someone said it to you. Do you recall who that was?

[60] A. No, I don't.

THE COURT: Said what?

MR. STEPANIAN: Q. Said to you that there appeared to be some sort of workshop or something of that nature.

A. I think it was Shipp. I am not sure.

Q. In the barn or the barn appeared to be this?

THE COURT: Could you see through the windows or what?

THE WITNESS: In my recollection, your Honor, the barn is two stories. The lower level of the barn had some very large sliding doors which were open already. The upstairs portion was padlocked. You could not see.

MR. STEPANIAN: Q. How far was it from the residence?

A. I would estimate 75 feet.

THE COURT: Any questions?

MS. ROSCOE: I have just a few.

CROSS-EXAMINATION

By Ms. Roscoe:

Q. LT. Kirkland, when you first arrived, did you see Cleo inside the kitchen area?

A. No, I didn't.

THE COURT: She came to the door, he said.

THE WITNESS: I went up and knocked on the door.

[61] MS. ROSCOE: Q. And she answered it?

A. Yes.

Q. The area that you called the living area, is that off of the kitchen area?

A. Well, there are two rooms but not partitioned off so I guess you could say that. It is clear one is a kitchen and the other is a living room, but there is no wall.

Q. Then a small area off where files and paper material is kept?

A. There is a doorway with no door on it. As I recall, there is a little hallway. Turning left you would go into the office area, if you will. Turning right you would go into the bathroom.

Q. Then if you went out of that main area and across the hall, you would come to a workshop, is that not correct?

A. Opposite the living room of the lower floor there is a workshop.

Q. And there is machinery and tools and items of that nature in there?

A. Yes.

Q. Did you stay in the kitchen-living room area, is that where the guns were collected?

A. Yes.

Q. Do you know where other officers went?

A. Only from what they told me.

[62] Q. Did you direct them to specific rooms?

A. No.

Q. Did Cleo stay with you in the kitchen area?

A. Yes.

Q. Was she free to leave at any time?

A. Up until the qualudes were found, they were free to leave. In fact, she got out the front door right about the time they were found and return was requested.

Q. Was your permission for her to leave for a doctor's appointment?

A. Yes.

Q. And you gave her that permission?

A. Yes.

Q. And she went out of the house?

A. She started out of the house.

Q. Did you send someone after her?

A. I did.

Q. During the period of the time she was out of the house, is that when the qualudes were found?

A. Again, now, all of these events were happening almost simultaneously but very close to that time frame when that occurred.

Q. Then they were brought to you in the kitchen area?

A. Yes.

Q. And then you sent someone outside to instruct Cleo [63] to come back?

A. Sgt. Shipp and I sort of did that simultaneously. He was coming up from the basement. Told me about this stuff.

Q. What I am asking is whether you personally sent someone outside to instruct her to come in?

A. I yelled out, "Bring her back," or "Stop her."

Q. To whom did you yell that?

A. I think that it was Deputy Valdez, but I am not certain in that regard.

Q. Prior to your opening the suitcase, until that point, she was free to leave and in fact was in the process of leaving?

A. Yes.

Q. Now, where was she standing when you asked her the question about the ether?

A. At the sink.

Q. The kitchen sink?

A. Yes, Ma'am.

Q. And you asked her what the ether was for?

A. I could smell the ether strongly. I said, "What's the ether for?" she said, "It's for cleaning machinery." She said, "I don't know, maybe cleaning machine parts."

Q. At that point, had Officer Shipp gone to the basement?

A. It was at that point. Right in that area.

[64] Q. It was afterwards or before?

A. I do not recall.

Q. And do you recall Sgt. Shipp asking Cleo Marohn where the guns were?

A. No.

Q. Did you ever hear him ask her any questions about the guns?

A. No.

Q. Did you hear her reply or say to him, "There are no guns in the basement."

A. No. I did hear her say there was no basement, though.

Q. In that context, did she mention firearms?

A. No.

Q. Did you hear Shipp's question to her and that response back?

A. "Is there a basement?"

Q. That is what you heard Sgt. Shipp say, "Is there a basement?"

A. I can't say those were the exact words, but the point of the question was to determine whether there was or was not a basement.

Q. Then at that point, did you see what he did?

A. Yes. He walked over and behind the stairwell.

Q. Was she still in the kitchen at that point?

[65] A. She was.

Q. Did she ever go upstairs, to your knowledge?

A. I don't recall her going upstairs. She may have gone upstairs. In fact, if I may, I do recall that she asked to go upstairs to get some money. But that was after she was arrested, I believe. She got some money from upstairs. I am not sure when that was.

Q. Do you know what time she was transported to the county jail?

A. Sometime shortly after 12:00, I believe.

MS. ROSCOE: Thank you.

THE COURT: Okay. Any more questions?

MR. PENROSE: Just a couple, your Honor.

REDIRECT EXAMINATION

By Mr. Penrose:

Q. Are you in any way an expert in appraising the value of guns?

A. No, I am not.

Q. When you got the 40 or 50 guns, did you feel it was up to you to say, okay, this is $15,000 worth, we should stop?

A. Well, that wasn't really my thought. My thought was with respect to the probation violation, that any gun would constitute a violation, hence we continued our search.

THE COURT: Anybody from the civil division go up with you?

[66] THE WITNESS: Yes.

THE COURT: Who was that?

THE WITNESS: Deputy Ogie Franco and another man who was a civilian whose name I do not know.

MR. PENROSE: Q. When you said you didn't know the quantity of chemicals when you were speaking with Judge Kessell, was there an abundant quantity of each chemical?

A. Abundant quantity, yes, Sir.

Q. Just so the record will be clear and the court will understand the layout of the terrain there, I want you to describe the way the barn in constructed.

Is it constructed on a flat piece of land or a slope?

A. It is a tier construction. It is on the side of a hill.

Q. So there would be two ground levels?

A. If you approach it from the up slope.

Q. It was the upper story that was locked up?

A. That's right.

Q. And the bottom story was open doors at the time?

A. That's right.

MR. PENROSE: I have no futher questions.

MR. STEPANIAN: Just two questions.

[67] **RECROSS-EXAMINATION**

By Mr. Stepanian:

Q. The IRS people, do you recall whether or not they came—how many came on the first day?

MR. PENROSE: This is beyond the scope of redirect and I don't understand the relevance.

MR. STEPANIAN: It's a little unclear.

THE COURT: Do you recall that?

THE WITNESS: Mr. Stepanian, No, I do not recall when they came. I spoke to them that evening around 4:00 and alerted them to the situation. I don't remember if they came up that night or the next morning.

MR. STEPANIAN: Q. Do you know whether it was that Tuesday night or Monday morning?

A. No, I don't remember. But they were there at least on one of those two days, yes.

Q. How many?

A. I was never back to the residence after that first day, so I do no know how many went to the house. I saw three down at my office.

Q. Did they say they had been there?

A. One of them said that definitely.

Q. Sheriff Norren (phonetic), was he there?

A. At the house, yes.

Q. Now, just before you went into the house, it's a [68] fact that a weapon was in the hands of Tanner, is that correct?

A. A shotgun.

A sheriff's office shotgun?

Q. Yes.

A. Yes.

Q. He had a shotgun in his hands?

A. I believe so.

Q. That was the weapon that was drawn among the individuals that walked up to the door, is that correct?

A. It's hard to holster them, yes, sir.

Q. It was pointed in the general direction of the door. That was a glass door, is that right?

A. I don't think so. I think he was holding it port arms.

Q. Did you see him tap it on the glass?

A. No, I didn't. He may have.

Q. Did you notice how Sgt. Shipp went down into the basement?

A. No. All I could see was him rounding the corner of the banister that goes also upstairs.

Q. You didn't see how he got in?

A. No.

THE COURT: Your next witness.

MR. PENROSE: Government calls Inspector Otis Pogue

[69] OTIS HARVEY POGUE,

Called as a witness on behalf of the government, being first duly sworn, testified as follows:

THE COURT: State you full name and spell your last name, please.

THE WITNESS: Otis Harvey Pogue, P-O-G-U-E.

DIRECT EXAMINATION

By Mr. Penrose:

Q. Inspector Pogue, what's your employment?

A. I am an Inspector with the District Attorney's Office of Santa Cruz County.

Q. How long have you been with them?

A. Approximately five years.

Q. I want to direct your attention back to the fall of 1980. Little less than a year ago.

Did you back in that period of time have occasion to come in contact with a case involving a defendant named William David Merchant?

A. Yes, I did.

Q. Describe for us that first contact you had?

A. Yes, Sir.

It came from an investigation request from Patty Bazar requesting that I test fire a weapon that was involved in a brandishing incident.

Q. Did you do that?

[70] A. Yes, I did.

MR. STEPANIAN: Could we have a foundation as to the date and time that this occurred.

THE COURT: In the fall of '80, you say?

THE WITNESS: It was August 5th.

MR. PENROSE: Q. August 5 of 1980?

A. Yes.

THE COURT: Test fire a weapon, you say?

THE WITNESS: Yes, Sir.

MR. STEPANIAN: Your Honor, I would say anything prior to the sentencing of November 14th is irrelevant to these proceedings.

THE COURT: Yes. Makes no difference to me. Just how he got acquainted with the case. That's all.

MR. PENROSE: Q. What was the next contact you had with any matter involving the prosecution of Mr. Merchant?

A. Probably have been after I observed the serial number of the gun and compared this to a previous case in 1976 which involved Mr. Merchant who was convicted—

MR. STEPANIAN: Again, your Honor—

THE COURT: Sustained. He is familiar with the case. Let's get down to the case itself.

MR. PENROSE: Q. Did you have occasion sometime in the fall of 1980 to make an inspection of the area around Mr. Merchant's property on Highland Way?

[71] A. Yes, Sir, I did.

Q. Approximately when was that with relationship to the November 14th, 1980, sentencing?

A. It would have been late October, prior to the sentencing.

Q. How was it that you had gone up there?

A. Again, Patty Bazar.

Q. What was your purpose in going up there?

A. Attempting to locate and photograph an alleged sign that had been alluded to by several police officers on Mr. Merchant's property.

THE COURT: Sign?

THE WITNESS: Yes, Sir.

MR. PENROSE: Q. Did you find the sign?

A. No, Sir, I did not.

Q. When you didn't find the sign, did you conduct any interviews or investigation to try to get a location on the sign?

A. Yes, Sir, I did.

Q. Who did you speak with in that context?

A. First contacted a Mrs. Williams who lives in that particular area.

Q. Can you give us any idea as to the distance—can you give us any idea where her residence was with respect to Mr. Merchant's?

[72] A. Yes. Her residence is adjacent to the Collins' who are adjacent to Mr. Merchant. So she is two doors down. Some distance separates them, though.

Q. And did you have discussion with Mrs. Williams on that occasion?

A. Yes, Sir, I did.

Q. What did Mrs. Williams say to you in summary concerning Mr. Merchant?

MR. STEPANIAN: I object to it as calling for hearsay.

THE COURT: Sustained.

This is about the sign. Talking about the sign?

THE WITNESS: No, your Honor. This is concerning complaints in the neighborhood concerning Mr. Merchant.

THE COURT: This is not for the fact but just for the state of mind. Overruled.

THE WITNESS: She related the numerous problems that she and the Collins' had over the period of years with Mr. Merchant.

MR. PENROSE: Q. Did these problems include firearms, according to her?

A. Most definitely.

Q. As a result of your talking with Mrs. Williams, did there ensue over the following months a series of telephone calls that you received from Mrs. Williams?

[73] A. Yes, Sir, they did.

Q. How many telephone calls would you estimate that you received from Mrs. Williams in a period starting between the November 14, 1980 sentencing and March 3 of 1981?

A. I would estimate approximately eight to ten.

Q. Can you give us a general overview of the text of those calls?

A. Generally, it would be Mrs. Williams calling either to find out how the case was going or to report that the same activity was still going on.

Q. Same activity being what?

A. Shots being fired.

Q. From where?

A. From Mr. Merchant's property.

MR. STEPANIAN: Again, your Honor, I would just—

THE COURT: You may have a standing objection.

MR. PENROSE: Q. What did you do once you received such a complaint from Mrs. Williams?

A. I relayed those to Patty Bazar.

Q. You testified you went up once looking for a sign.

A. Went up twice, actually.

Q. Tell me about the second visit.

Did you have occasion to talk to anybody during the second visit to the area?

A. No, I didn't, as I recall. On the first visit, we [74] passed over it, but I talked to two people. I first had contact with Mrs. Williams. The second one was with Mr. Collins.

Q. Same day?

A. Same day.

Q. As a result of those conversations, that conversation with Mr. Collins, did you get any phone calls from her in the period between November 14, 1980 and March 3?

A. I believe I got one from Mr. Collins.

Q. What was the context of that call?

A. He had observed what he believed to be marijuana and wanted to report that to me and wanted some assistance and said it could be seen from his property onto Mr. Merchant's property.

Q. Did you investigate and was that subsequently determined to be unfounded?

A. Yes, It was.

Q. Are you a member of an Elks Club anywhere?

A. Yes, Sir, I am.

Q. Did you have occasion sometime in the first couple of months of 1981 to have a discussion at an Elks Club meeting in which Mr. Merchant came up in the subject matter?

A. Yes, I did.

Q. Would you recite that conversation?

A. Yes, Sir.

[75] I was approached by one of the Elks members who I had seen and occasionally chatted with. I don't know his name. He knew that I worked for the District Attorney's Office and said he would like to talk to me for a moment.

He relayed that his daughter lived on Old San Jose Road.

MR. STEPANIAN: I would object.

THE COURT: Sustained.

Can't you identify this person?

THE WITNESS: Identify him by sight. I don't know his name.

Like I said, there is several hundred members there. I know a lot of them by sight, but I don't know his name.

MR. PENROSE: Your Honor, I think that it is undisputed that probable cause can be—we are not talking probable cause here. We are talking here reasonable grounds in the context of a probation search. Hearsay is admissible—

THE COURT: But this is hearsay. You don't even know who the person you are talking to is.

MR. PENROSE: I don't believe it is required that the source of hearsay in a probable cause context can be identified. Commonly we're dealing with anonymous informants in the context of probable cause. So I think that this [76] evidence is admissible and again going to the state of mind of the Santa Cruz Officials in having reasonable grounds to conduct this search.

THE COURT: This guy is going to say his daughter lives up there and something happened up there. Make an offer of proof.

MR. PENROSE: Your Honor, this is exactly the offer of proof: This would be a report by this Elks Club member to inspector Pogue concerning information received from his daughter about Mr. Merchant and firearms.

THE COURT: That's cumulative. Sustained.

MR. PENROSE: Q. Do you know of a man named Bruce Wrenn?

A. Yes, I do.

Q. Did you have conversations with Mr. Wrenn concerning firsthand experience Mr. Wrenn had with Mr. Merchant during this time period of November '80 to March of '81?

A. Yes, Sir, I did.

Q. Would you recount that conversation?

A. Yes, Sir.

I received a call from Mr. Wrenn, I believe it was, on the 4th of February. I received a call the day prior and I had been out.

Mr. Wrenn related that he lived on Old San Jose Road and described the property and that he had met [77] Mr. Merchant as Mr. Merchant had cut down a tree on Mr. Wrenn's property. He had made a report to the sheriff's department of that.

He approached Mr. Merchant and confronted him about the cutting of the tree. Mr. Merchant –

MR. STEPANIAN: Excuse me, Mr. Pogue. This has no relevancy to the Highland Street property. This is San Jose property. It is someplace other than the subject property in this case.

THE COURT: I think he had a conversation with Mr. Merchant.

Did you have a conversation with the defendant?

THE WITNESS: Mr. Wrenn did.

THE COURT: Concerns of the same individual?

MR. PENROSE: Yes, Your Honor.

Q. You may proceed.

A. During the confrontation about the cutting of the tree, Mr. Wrenn received what he thought was a threat, because Mr. Merchant had alluded to the fact that his girl friend carried a .44 magnum weapon.

Q. Did you pass these complaints on?

A. Yes, Sir, I did.

MR. PENROSE: If I may show a document for a moment to counsel.

Your Honor, may I approach the witness?

[78] THE COURT: You may.

MR. PENROSE: Q. Inspector Pogue, I am showing you a xerox sheet containing what purports to be message slips, telephone message slips.

Can you tell us what they are?

A. Yes, sir.

These are message slips that are filled out by the receptionist at the District Attorney's Office if we are not in to

receive a phone call. It has the name of the caller, return phone call number and on occasion what it is in reference to.

Q. What are the dates from the caller depicted there?

A. Each of them are to me. The first one is the 2nd of January. Time is 3:53. It is from Joan Williams. Call back number. Reference Merchant.

Q. Taking that first slip as typical, can you make a search through your records to retrieve those message slips?

A. Yes.

Q. There is not a year that appears on those dates?

A. It is '81.

THE COURT: How many do you have?

THE WITNESS: I have a total of four.

THE COURT: Are those not included in the eight to ten you mentioned before?

THE WITNESS: It would be included in those.

[79] MR. PENROSE: That is marked as G-1 in the lower right-hand corner?

A. That's correct.

MR. STEPANIAN: I would interpose an objection, your Honor, as to the introduction of these items in that they are hearsay.

THE COURT: He's already testified he received eight to ten calls.

Are you contending that Mrs. Williams did not call eight to ten times?

MR. STEPANIAN: I don't know because I have never spoken to her.

THE COURT: It will go unchallenged.

MR. STEPANIAN: Let's see on Cross-Examination.

MR. PENROSE: Q. As I understand it, you were not available and did not participate in the search of March 3 of Mr. Merchant's residence, is that correct?

A. No, sir.

MR. PENROSE: I have nothing further.

CROSS-EXAMINATION

By Mr. Stepanian:

Q. Mrs. Williams and Mr. Collins are neighbors, is that correct?

A. That is correct.

Q. And they live in close proximity to each other?

[80] A. That is correct.

Q. And they live in area commonly referred to as Highland Road, is that right?

A. That's correct.

Q. And they live close by David Merchant's house?

A. Correct.

Q. Or the house that was searched in this case, correct?

A. Correct.

Q. Do you know which house was built first?

A. No, I do not.

Q. Do you know who moved into that area first?

A. In reference to whom?

Q. In reference to Mr. and Mrs. Williams?

A. No, I don't.

Q. How about in reference to Mr. and Mrs. Collins?

A. Who moved in first in reference to whom?

Q. Mr. Collins in reference to Mr. Merchant.

A. As I recall, Mr. Merchant was living there when Mr. Collins moved in.

Q. Right.

It is a fact, is it not, to your knowledge that Mr. Williams moved in after Mr. Merchant?

A. I don't know that to be a fact.

MR. PENROSE: I object to the relevancy.

[81] THE COURT: Overruled.

MR. STEPANIAN: Q. Now, he talked with Mr. Williams or—

A. Mrs. Williams.

Q. Did you have occasion to talk to Mr. Williams?

A. Yes, I have.

Q. Did you talk to Mrs. Williams with Mr. Williams?

A. No.

Q. Did you talk to Mrs. Williams with Mrs. Collins?

A. No.

Q. Did you ever talk to Mr. Collins and Mrs Williams?

A. Together you mean?

A. Yes.

A. No.

THE COURT: You have another combination?

MR. STEPANIAN: That's enough for me.

Q. But you talked with Mrs. Williams and Mrs. Collins?

A. Not together.

Q. It is a fact, is it not, Officer Pogue, that there was acrimony between Mr. Collins and Mr. Merchant?

A. I would believe that to be true, yes.

Q. This was a feud between these people for a considerable amount of time?

MR. PENROSE: Objection to the characterization.

THE WITNESS: I am not sure "feud" is the word.

[82] THE COURT: Overruled. He can say yes or no.

THE WITNESS: I was aware there had been some civil litigation and some arguments back and forth.

THE COURT: Would you state there is some bad blood between them?

THE WITNESS: They certainly didn't like one another.

MR. STEPANIAN: Q. And the Williams family and the Collins family are friends?

A. Yes.

Q. And Mrs. Williams complained about Mr. Merchant, correct?

A. Correct.

Q. And Mr. Collins complained about Mr. Merchant?

A. Correct.

Q. Now, I think your testimony was that there was some gunfire in that area.

A. Yes.

Q. Was there any testimony about gunfire coming from any of the other parts of the area?

A. No.

Q. So the only gunfire that Mrs. Williams talked to you about was the gunfire that was coming from the Merchant area, is that correct?

A. That's correct.

[83] Q. Where on the Merchant area did they say?

A. She didn't specify.

Q. How big is that area?

A. It includes several acres. I don't know exactly.

Q. What portion of the acreage did she say this came from?

A. She didn't specify.

Q. Did she see anybody on the property?

A. Firing the weapon?

Q. Yes.

A. No.

Q. Did Mrs. Collins, talking about these times when they called, Mr. Collins called once?

A. Mr. Collins called once.

Q. How many times did Mrs. Collins call?

A. I don't recall her calling. I had a conversation with her at her house.

Q. Did Mrs. Collins say from what part of the area of the several acres here the gunfire was coming from?

A. No.

Q. How about Mr. Collins, did he say what area?

A. At times he had specified that it was coming from around Mr. Merchant's house.

Q. Where around Mr. Merchant's house?

A. He didn't specify any particular area.

[84] Q. Did he see anybody shooting the guns?

A. He never told me he saw anybody shooting the gun. He had seen Mr. Merchant in possession of a rifle.

Q. Was that in the conversation he had with you?

A. Yes, it was.

Q. And where did he say he had this rifle?

A. Mr. Merchant was sitting on a fence and at some point Mr. Merchant points the rifle in his direction.

Q. Did he make a complaint about that?

A. No. He had made numerous complaints to the sheriff's department. He was reiterating things that had happened to give me an idea of what had been going on in that area.

Q. He didn't like Mr. Merchant?

A. He appeared to. I don't know if Mr. Merchant liked him or not.

THE COURT: Anything else?

MS. ROSCOE: If I may. Just a few questions.

CROSS-EXAMINATION

By Ms. Roscoe:

Q. Inspector Pogue, is it correct you went out in the vicinity of the Merchant property three times between the November 4th date of 1980 and the March 3rd date?

A. I believe two.

Q. Twice you went up looking for a sign?

[85] A. Uh-huh.

Q. And that was at the request of Mrs. Williams?

A. No.

Q. Of Mr. Collins?

A. No.

Q. Of either of those two persons?

A. No.

Q. Then another time you went up looking for marijuana?

A. No.

Q. You never went up there looking for marijuana?

A. No, I did not.

Q. You received a telephone complaint that there was marijuana growing on the Merchant property?

A. Correct.

Q. Then did you report that to anyone else?

A. Yes, I did.

Q. Who was that?

A. Reported it to Bob Shipp of the Narcotics Bureau, Sheriff's Department.

Q. Did you also report it to Patty Bazar?

A. Yes, I did.

Q. Were you and Patty Bazar working as a team investigating this case?

A. No.

[86] Q. Of the eight to ten times when Mrs. Williams called you, part of those calls were requests for information as to the case proceeding?

A. Some of them were. Wanted to know what was going on. Why there was delays.

Q. Were any of those conversations regarding the civil suit—the judgment that they were attempting to collect?

A. I was aware of it, but I don't believe any conversations with Mrs. Williams concerned the civil suit.

Q. What about with Mrs. Collins. Did she discuss the civil judgment with you?

A. I think only to tell me that it existed.

Q. Mr. Collins, did you discuss the civil judgment with him?

A. I don't recall, no.

Q. Did they request your help in executing the writ?

A. No.

Q. Did you discuss the execution of the writ with either Mr. or Mrs. Collins?

A. No.

Q. To your knowledge, did Mr. or Mrs. Collins, were they aware that the writ was going to be executed on March 3rd?

A. Not to my knowledge.

Q. Did you bring all the message slips that you had in your possession concerning the Merchant property?

[87] A. And the dates concerning the March date when the search warrant was executed.

Q. So those four message slips represent the calls that you received but did not immediately communicate with?

A. They represent calls that I received, calls that I was not in and they took a message from January 1st until March 3rd.

Q. There were four of those?

A. Right.

Q. And then you had eight to ten phone calls from Mrs. Williams?

A. I believe so.

Q. And how many would you say from Mrs. Collins?

A. None.

Q. And one from Mr. Collins?

A. Yes.

Q. Any from Mr. Williams?

A. No.

Q. Regarding the tree cutting, did you investigate that incident?

A. To the extent I retrieved the Shriff's [*sic*] Department report and passed on that information along with the report to Patty Bazar.

Q. Did you ever ascertain on whose property the tree was?

[88] A. From Mr. Wrenn. He complained that it was on his property and that's what he reported in the report to the Sheriff's Department.

Q. You have no further knowledge as to the location of the tree other than his representations?

A. I've seen the area the tree was in, yes.

MS. ROSCOE: Thank you.

FURTHER CROSS-EXAMINATION

By Mr. Stepanian:

Q. When was it that Mr. Collins called you?

A. It was on the 30th of January.

Q. And was that when he complained about the marijuana?

A. I believe it was, yes.

Q. And he talked to about shooting, too?

A. No. The shooting came actually after the execution of the search warrant. I went out and talked to Mr. Collins.

Q. Related to the gun incident?

A. I think that probably occurred at that time. I think there was some discussion on that phone call about the shooting incident, but I don't know to what extent. I know it was mentioned.

Mr. Stepanian: I would ask that be stricken.

Q. That's what I wanted to clear up on the foundational part. It occurred subsequent to the execution of the [89] search warrant after March 3rd?

A. The conversation about the pointing of the gun probably occurred after March 3rd.

MR. STEPANIAN: I would ask that be stricken.

THE COURT: Granted.

Do you mean the girl friend carrying the pistol?

THE WITNESS: When he was pointing the rifle.

THE COURT: That may be stricken.

MR. STEPANIAN: Okay. I just want to clear that up.

MR. PENROSE: I do have one item of redirect.

FURTHER CROSS-EXAMINATION

By Ms. Roscoe:

Q. Inspector Pogue, did Mr. Wrenn tell you that Merchant's girl friend carried a .44 magnum?

A. He said Mr. Merchant told him that.

Q. That she carried it around?

A. That's what he told me.

Q. Did he say he had ever seen her with any weapon at all?

A. No, he didn't say that.

Q. Did he indicate that he knew her?

A. No.

Q. Did you know who he was referring to when he referred to Merchant's girl friend?

[90] A. I suspected, but I didn't know.

Q. Who did you suspect?

A. I suspected it was the person he was living with on the Highland Way property.

Q. How did you have that knowledge that he was living with someone at the Highland Way property?

A. It had been passed on to me through other means and a police report of the brandishing in 1980.

Q. Were you investigator in that case?

A. Only to the point of test firing the weapon.

Q. So you were aware of her identity through those reports?

A. Yes, I was.

MS. ROSCOE: Thank you.

REDIRECT EXAMINATION

By Mr. Penrose:

Q. Did you form an opinion concerning the past record of Mr. Merchant in divesting himself of firearms upon court order?

A. Yes, I did.

MR. STEPANIAN: I object to that.

THE COURT: Sustained.

MR. PENROSE: Your honor, may I be heard for a moment?

THE COURT: We called the officer here to testify [91] to knowledge about the shooting up there as a justification for the search, right?

MR. PENROSE: I am offering Inspector Pogue for every relevant purpose I can.

THE COURT: He hasn't indicated—I guess he told the District Attorney Bazar about the shooting, right?

You passed the information on?

THE WITNESS: Yes, sir.

THE COURT: You want to know about divesting himself of weapons?

MR. PENROSE: If I may make a specific offer of proof.

We don't have a jury in the box. I know the court wants a complete record.

The offer of proof was there was a prior conviction for brandishing.

THE COURT: I know.

MR. PENROSE: That there was an order that the gun be disposed of and not retained by the defendant. There was a finding by Inspector Pogue, investigative finding, that what in fact happened was the weapon was supposedly sold to Mr. Merchant's previous defense attorney and then resold by the defense attorney back to Mr. Merchant's girl friend.

THE COURT: That came out in the transcript. He sold it and somehow got it back. Unless it had something to do [92] with the decision to make the inspection, it is not relevant.

MR. PENROSE: Your honor, I think all of these factors are—

THE COURT: Who made the decision to go up and make the search?

MR. PENROSE: Your honor, it was made, I think, jointly among sheriff's office people and the district attorney's office people. All of these factors would have played a role.

THE COURT: The knowledge would have to be in the mind of the person who made the decision to make the search. There is no showing that Officer Pogue was that person. Maybe he participated in the discussion. Then it would be all right.

MR. PENROSE: Q. Inspector Pogue, did you ever report to anyone else at the District Attorney's Office or anybody in the Sheriff's Office of what you had learned concerning the circumstances of the firearm in a previous brandishing conviction being disposed of and then reacquired by Mr. Merchant?

A. Yes, sir, I did.

MR. STEPANIAN: I would say that this is irrelevant and that it goes beyond our discussion in these proceedings here. It gets into character evidence.

THE COURT: It is only received for the purpose of a belief on the part of a searching officer that he had [93] possession of the weapon in violation of the instructions of the court.

MR. STEPANIAN: Your Honor, I believe the only way we are going to delve into this is to show the history of that weapon. In fact, I believe, although I am not sure, that Mr. Merchant was not on probation at the time that that weapon was in his possession.

THE COURT: Which one are you talking about?

MR. STEPANIAN: This weapon that I believe Mr. Penrose is making the subject of his offer of proof. We're getting into a case where we're going way back into a situation where a weapon apparently got back into the hands of Mr. Merchant. There was colloquy between he and the Judge.

The precise definition of what that original order was concerning that weapon is ambiguous.

The Court: The point is whether or not this witness thought there had been a violation and this witness conveyed it to another person who made the decision to then make the search. I am not accepting it for the truth of the matter that there was such an occurrence. If these people thought he was playing around with guns and he wasn't supposed to, that goes to the state of mind when they decided to make a search. I've not yet got the foundation as to who he communicated it to and when.

Mr. PENROSE: Q. Who did you communicate your [94] findings concerning the reacquisition by Mr. Merchant of the firearm?

A. First it was to Patty Bazar and then I presented that to Mr. Tanner of the District Attorney's Office.

THE COURT: When?

THE WITNESS: Shortly after I found it out. August of 1980.

THE COURT: Before he was sentenced?

THE WITNESS: There was a progression of things that happened after that. Also Judge Marlowe was made aware of that. Judge Marlowe requested that this issue be followed up to find out how he came to have the weapon in his possession. This was the November 14th sentencing.

MR. PENROSE: Q. You told that to District Attorney Tanner and to his assistance, Patty Bazar, at some time before November 14, 1980?

A. That's correct.

Q. What was it you told them?

MR. STEPANIAN: I would object.

THE COURT: You have to stand up.

THE WITNESS: The year of this prior situation was, I believe, 1976. So we're getting—

THE COURT: Sustained.

MR. PENROSE: I have nothing further.

THE COURT: That's all. Thank you, Inspector Pogue.

[95] MR. PENROSE: I move the admission in evidence of G-1.

THE COURT: May be received.

(Whereupon, exhibit no. G-1 was received into evidence.)

PATRICIA ANNE BAZAR

called as a witness on behalf of the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Penrose:

Q. Mrs. Bazar, you are an Assistant District Attorney in Santa Cruz County, is that correct?

A. Yes.

Q. How long have you been so employed?

A. Almost two years.

Q. In the course of your duties as an Assistant D.A., have you had an occasion to handle and prosecute cases in which William David Merchant, III, was a defendant?

A. Yes.

Q. What were the charges on the first such case that you can recall prosecuting—strike that.

How many cases?

A. Almost one to its completion. That was the 417, 417-B.

Q. That would be brandishing firearms?

[96] A. Yes.

Q. When were those charges brought, approximately, month and year?

A. Trial was in probably October. Probably eight months prior to that. I don't really—

THE COURT: There is no dispute that there was a prosecution and a conviction.

MR. STEPANIAN: No, your honor.

MR. PENROSE: All right.

Q. When was the sentencing in that case?

A. I think the 14th of November.

Q. After the sentencing in that case and prior to March 3 of 1981, did you have occasion to receive complaints and reports of complaints concerning firearms being discharged around Mr. Merchant's property or firearms and Mr. Merchant?

A. Yes.

Q. Would you recite those complaints?

MR. STEPANIAN: It is a compound question. Can we compartmentalize it.

THE COURT: You received complaints about the firing of firearms on the Merchant property, is that correct?

THE WITNESS: Right.

THE COURT: How many and when did you receive them? Can you recall?

THE WITNESS: I don't remember an exact number. [97] I had gotten to know a number of the neighbors through my original investigation in the misdemeanor matter. I believe that after the sentencing—that would have put us right in the holiday period. I didn't remember specifically receiving any the end of November or December. I think things quieted down for a period of time.

Then it seems to me that they started up again sometime the first to the middle of January. I think the first thing I specifically remember was sometime in the middle of January when I went with—

THE COURT: Let's stay with the complaints first.

Who did you receive them from?

THE WITNESS: This was a complaint from Mrs. Collins.

MS. PENROSE: Q. Was this a telephone call or face-to-face?

A. This was face-to-face.

Q. Where did this occur?

A. I was up at her house.

Q. What was the occasion?

A. I had gone with Sgt. Shipp and another deputy, because they were going to check some type of plant that was on the border between the Collins' and Mr. Merchant.

Q. Was this the subject of a complaint, the plant?

A. Yes.

[98] Q. Did the complaint turn out to be unfounded?

A. Yes.

Q. So in the course of your visit there, what was the conversation that you had with Mrs. Collins concerning Mr. Merchant and firearms?

A. Well, I stayed behind with Mrs. Collins. I had met her before on a few other occasions. I asked her how

things were going. She then went into a long discussion of the fact that they were having repeated problems with Mr. Merchant and how the gunfire—the shots were going on all the time and how scared she was because of her kids, et cetera, et cetera.

Q. Did she recite any particular measure she had taken concerning her children?

A. Yes. I think she described it as living in a combat zone. She said she had small school-age children and she felt bad because when the fire started they remained inside until the gunfire stopped.

MR. STEPANIAN: I would object to any of these statements as hearsay.

THE COURT: For the same reason that the other complaints were received. Not [to] establish the truth of the matter but to establish the state of mind that she was investigating.

You have a continuing objection to this line of questioning.

[99] MR STEPANIAN: I would also like to make another statement. That is, as far as cause to go up to that residence, these kinds of—

THE COURT: This is not argument time. You can argue that when the evidence is in.

MR. STEPANIAN: Okay.

MR. PENROSE: Q. Did you hear again from the Collins', either one of them, between the time that you visited, as you just described, and March 3 of 1981?

A. Yes. I think when I was talking to Mrs. Collins she indicated to me that her husband was keeping a record of these types of disturbances or was sort of keeping a log of what was going on up there in relation to his civil case.

I indicated to her that I would like to talk to him or have him talk to the investigator in our office.

I had a later conversation just over the phone. I don't believe I've ever met Mr. Collins face-to-face.

Then sometime after that, maybe a few weeks after that, which would put it sometime around the first part of

February, that's when I found—I had gotten a call from an individual who lived on old San Jose Road. This was a Mr. Wrenn. It was in regard to some type of a disagreement involving—well, it started out involving a tree that was on his property which apparently Mr. Merchant either cut down himself or had an employee of his cut down without speaking to [100] the owner.

Mr. Wrenn was calling our office because he apparently confronted Mr. Merchant about it and received what he felt were a number of threats. He had connected with me because he had met a woman in a grocery store and I believe it was Mrs. Williams.

Q. What was that complaint that he related to you?

A. Related to me that he confronted Mr. Merchant about this tree incident? The conversation got increasingly more hostile and Mr. Merchant made some reference to the fact that he shouldn't bother him because both him and his girl friend had .45's.

Q. Does that complete the review of the complaints that you received firsthand during this period as best you can remember them?

THE COURT: That's enough complaints.

MR. PENROSE: Thank you, your Honor.

Q. Did you take any action with respect to these complaints?

A. Absolutely.

Q. What was your decision on the appropriate action?

A. Well, I went back and looked at my old file to figure out exactly what the status of the case was and then went and did some legal research to try and find out what position the people had in relationship to the stay that had [101] been issued by the trial judge. Came to the conclusion that the case file stated that what was said in fact was simply the jail time and not the probation itself.

Q. And did you file any pleadings after having done that research?

A. Yes.

I noticed a motion and filed it, I think, on February 14th.

Q. Was that the motion for clarification/modification?

A. That's correct.

Q. When did that actually come to a hearing?

A. 27th of February.

Q. Wasn't there anyone present there on behalf of the defendant?

A. His attorney, Mr. Foster.

Q. Did you have occasion to say anything to Mr. Foster while the two of you were waiting for Judge Marlowe to come out on the bench?

A. Yes.

I was there first. Mr. Foster came in and made a somewhat directorial comment about the motion. I said something to the effect of, "Sam, what do you expect me to do? We're still having the same problems." I told him to tell him to cool it. The neighbors are calling lately and he's still firing the guns up there.

[102] Q. Were you present on March 3rd at the time of the search?

A. Yes, I was.

Q. Did you actually participate in the search or were you there as a legal adviser?

A. I was there as a legal adviser.

MR. PENROSE: I have nothing further.

CROSS-EXAMINATION

By Mr. Stepanian:

Q. How long were you a District Attorney prior to November 14th, 1980?

A. Eleven months.

Q. And this case that Mr. Merchant was convicted of was a misdemeanor, is that correct?

A. That's correct.

Q. You testified on your direct testimony just now that you went up to the area surrounding the Merchant property with someone, namely, Mr. Shipp, to make an inspection of some plant of some kind; is that correct?

A. Yes.

Q. You knew, didn't you, that there was a complaint from Mr. Collins and you discussed with Mr. Shipp the potential that there was drugs there, is that correct? You talked about marijuana?

A. We talked about the reason for going up there, yes.

[103] Q. What was the reason for going up there?

A. Apparently Mr. Pogue had talked to Mr. Collins and he felt there was possibly some marijuana growing in the border between Mr. Collins' house and the Merchant residence. He didn't know what it was and they wanted to know if there was someone from our office, specifically Mr. Pogue, that could go up there and could look and identify it. He couldn't go, so he arranged for Sgt. Shipp and for me to go with him.

Q. You called Mr. Shipp and you went up there to take a look at that?

A. I didn't call Sgt. Shipp, but, yes, I was to go up there with Sgt. Shipp.

Q. And you and Sgt. Shipp and someone else went?

A. It seems to me I believe it was another deputy.

Q. Do you recall me asking this question of you one other time, whether you went up there to make an inspection of a marijuana plant, and you indicated you did not know of anyone who did that?

A. No.

MR. PENROSE: May we have a page? I object. I would like to have a recitation of the page.

THE COURT: He can ask it this way.

MR. STEPANIAN: Q. Do you recall saying that?

A. Do I recall telling you that?

Q. For your purposes, I will give you the exact page.

[104] 185.

"QUESTION: Let me ask you, do you know anybody that went up there and took a plant, which purportedly was a marijuana plant, prior to your filing of the motion?"

A. Nobody took a plant.

Q. You say, "not that I know of." Was there a plant there which was a marijuana plant?

A. I didn't look.

Q. You didn't look?

A. I didn't go to make the inspection.

Q. Who went to make the inspection?

A. Sgt. Shipp and the other deputy from narcotics.

Q. You went with Sgt. Shipp?

A. I stayed with Mrs. Collins.

Q. I see.

So your testimony is that when you went up there with Mr. Shipp you did not go up there to make any inspection as far as marijuana is concerned?

A. Not myself personally.

Q. Subsequent to this hearing, did you have a conversation concerning marijuana with Mr. Shipp?

MR. PENROSE: The hearing?

MR. STEPANIAN: On April 29th.

[105] THE COURT: What's the relevancy of that?

MR. STEPANIAN: Relevancy, your Honor, is that she testified she did not go to inspect the marijuana.

THE COURT: Makes no difference anyway. There was no marijuana.

MR. STEPANIAN: Okay.

Q. How many times did you go up to that area, that is, the Collins-Wiliams-Merchant area?

A. Between now and—

Q. Between the 14th of November until March 3rd?

A. I went twice to the old San Jose Road area and several times probably to the other area.

Q. When you went up there, could you see the property from the various places that you stood, the Merchant house?

A. No. You can't see the Merchant house from the public road that leads back to the rest of the homes.

Q. How about where the Collins live?

A. If you go to a certain portion of the Collins property, you can see. That is the only place I know you can see the house, unless you are on the road in front of the Merchant house.

Q. And did you ask Officer Pogue to go up there and look at what was reported to be potentially marijuana?

A. I don't know if I asked him. He told me about the complaint. I said, "Well, can you go up there? Do you want [106] to go up there?" He said, "No, I can't." I arranged for Sgt. Shipp to.

Q. Who told you at first about that?

A. About the complaint about the marijuana?

Q. Yes.

A. Otis Pogue.

Q. You call him Pougie?

A. Otis, O-T-I-S.

Q. Fine.

Mr. Merchant did not have a probation officer?

A. As far as I know he didn't.

Q. Did you contact the probation office?

A. No.

Q. This is after you heard the complaints and you heard the conversation with Mrs. Williams, you didn't contact them, is that correct?

A. That's correct.

Q. From the 14th until the 27th, you had heard some complaints, is that correct?

A. 14th of November to the 27th of February, yes.

Q. It was a period where there was nothing happening, you say?

A. I don't recall any specifically during the holiday season, November and December.

Q. And it is a fact, is it not, that—strike that.

[107] Mr. Collins, there is a feud between those two, is that right? There's bad blood between those two people?

A. There is a long-standing dispute.

Q. You knew this?

A. Yeah.

Q. And you heard complaints from Mrs. Collins concerning Mr. Merchant, correct?

A. Correct.

Q. Did you hear complaints from Mrs. Williams concerning Mr. Merchant?

A. I believe I only spoke to her once, but I can't be sure if I spoke directly to Mrs. Williams.

Q. Did you hear any complaints from Mrs. Williams?

A. Yes.

Q. When did you speak to her?

A. That's what I said. I can't recall specifically if I spoke to Mrs. Williams. I heard complaints from her via other people.

Q. Fine.

THE COURT: Were there complaints about use of firearms?

THE WITNESS: Yes.

MR. STEPANIAN: Q. To get to the Merchant house, you go through a private road, is that correct?

A. It must be private.

[108] Q. The Collins' and Merchant's share a road, is that correct?

A. I assume that it must be the one down below, yes.

Q. Now, when you went there, you were in court when the sentencing was pronounced on Mr. Merchant, correct?

A. Yes.

Q. And needless to say, you heard and you read this transcript of what the judge said, correct?

A. Yes.

Q. After a period of time, you had occasion to want to clarify or modify what the judge's pronouncement of sentence was?

A. Yes.

Q. You were not sure, is it not true, that the stay that was granted to Mr. Merchant included all the conditions of probation?

A. At what point are you speaking of?

Q. After the 14th.

A. After November 14th?

Q. Yes.

A. After I did my legal research, I was sure of the case law.

Q. Well, why don't you tell me what you looked up in the case law.

A. I don't have the motion here. I haven't reread it. [109] If I could see the motion.

Q. Is it a fact that you wrote this motion or a legal assistant wrote the motion?

A. I did some preliminary research. I indicated the factual situation and some of the codes that I felt were applicable and gave them to a research attorney in our office. Actually, a legal clerk at that time. Asked her to write a motion and she wrote it. I reviewed it and we discussed it and I think I had her change a few things and I approved it.

Q. You went to your superior to ask a question as to his opinion as to whether or not this stay related to the conditions, correct?

A. I asked a number of people, yes.

Q. And you went and did some research to figure it out for yourself?

A. Basically.

Q. And then you went and you did some research and then you filed this motion, correct?

A. That's correct.

Q. Is it fair to say that you were asking for a clarification of the actual stay?

A. Yeah.

Q. In fact, the motion indicates in the points and authorities which you reviewed that—

May I approach the bench?

[110] THE COURT: You may.

MR. STEPANIAN: Q. On Lines 9 through 13: "The state order issued in the case, however, is not clear as to whether or not probation was stayed along with the rest of the judgment."

Is that correct?

A. Yes, that's correct.

Q. So at least from the 14th until the 27th, you felt that it wasn't clear as to whether the conditions were included in the stay of execution that was granted by the judge?

A. No, that's not correct? [*sic*]

Q. What is it then?

A. Because of the case log that I had reviewed indicated that unless the conditions and the grant of probation were specifically stayed, they were not stayed, and only the jail term was stayed.

Q. That is your understanding of the law, isn't that correct?

A. That is what I remember from the case.

Q. Which case did you remember?

A. That would be the In Re: Stallings.

Q. You advocated the position of the District Attorney's office and you are a litigant on various issues that come up, that's your job, correct?

A. Correct.

[111] Q. You represent the people and you argue against lawyers like myself, defense lawyers, all the time?

A. Defense lawyers, yes.

Q. You are an advocate, you have an opinion and you try to bolster up the best argument you can to present your position, isn't that correct?

A. That is correct.

Q. You filed this motion so that you would be able to get a clarification [of] what you believe was at least ambiguous?

THE COURT: Here is what it says on page 3, line 11. "If the court intended to stay only the remainder of the judgment and allow the probation to go into effect, the people ask that the order explicitly so state. If, on the other hand, the trial court originally intended to stay the entire judgment, the people specifically requested that the court reconsider that decision and exercise its discretion."

THE WITNESS: It was an argument. I felt that the case law was clear in my interpretation of it. But it's been my experience that nothing is clear until the judge and the county rules on it.

THE COURT: You did prepare an order for the judge to sign?

THE WITNESS: It was done orally.

[112] THE COURT: You could have presented an order to say, "I want to clarify this" and he would have signed it and you would have been home free and clear?

THE WITNESS: Right. Except we don't generally prepare orders. It's generally done on the record.

MR. STEPANIAN: Q. I am showing you then what the judge indicates as to what the result was from your hearing, is that correct?

A. Uh-huh.

Q. And that was that he reinstated—he uses that word "reinstated"—

MR. PENROSE: I object. First, it is argumentative. Secondly—

THE COURT: Sustained, sustained, sustained.

MR. STEPANIAN: I am just going to move through this quickly.

THE COURT: Thank you.

MR. STEPANIAN: Q. You wanted to clarify the stay of execution of November 14th, is that correct?

A. Yes.

Q. And you went to your superior. At that time, is it fair to say, that you weren't sure of what the effect of the stay was?

A. I just never encountered that situation, so, yeah, that would be fair.

[113] Q. And you did some research, preliminary research after being requested to do that by your superior, the District Attorney of Santa Clara County, you felt that the clarification seemed like the appropriate way to go, isn't that correct?

A. Yes, I was pretty sure of our position.

Q. Put it this way: You were solid of your position to the extent that you noticed a hearing to have a clarification modification of the sentence that the judge made on the 14th of November?

A. No, I was pretty sure that what had been—that what had been stayed was the jail sentence.

Q. I understand that. In answer to the question, after you ran across certain cases as to the extent of the stay which you expressed some confusion about prior to your research, is it fair to say that the idea of motion for clarification seemed like the appropriate way to go?

A. Yes.

Q. Now, you then did the various noticing, is that correct?

A. That's correct.

Q. And there was some irregularity as to your noticing on the ten-day rule, is that correct?

A. That's correct.

Q. And the first time you did this notice, apparently it was incorrectly done or you didn't give the correct notice, [114] correct?

A. I didn't give ten days.

Q. Then you had this hearing on the 27th?

THE COURT: You rescheduled again or did you go ahead on short notice?

THE WITNESS: I appeared in court. Mr. Foster didn't. The judge asked me did I give him ten-days notice. I hadn't. I sent him a letter that afternoon.

MR. STEPANIAN: Q. At the time you had the motion, it's a fact, is it not, that you wished to get this motion so you would be able to go up and search that residence?

A. I wished to get the motion because I wanted—yes. We wanted to search the residence.

Q. We—meaning yourself and Otis Pogue and various other policemen—discussed this motion to clarify or modify before it happened?

A. I had discussed the problem with them.

THE COURT: You were under the impresion that if the terms of probation were still on, regardless of which way it happened, that you would then have the authority under the terms and conditions of probation to search the residence?

A. I thought we had the authority then but, yes, I felt doubly certain that after the motion had been heard, assuming that the judge didn't completely contradict my belief, that we would have the right.

[115] I felt he was on probation. But either way after that hearing, I assumed that we would then have the—

THE COURT: You advised your office and the Sheriff's Department to that effect that you could go forward with the search?

A. Once I had advised them that I was bringing the motion. That I was going to go down and have it heard. When the judge granted it, I came back and relayed that to the investigator in our office. He then contacted the sheriff's office because he couldn't go. I think that got arranged on the Monday.

MR. STEPANIAN: Q. You spoke to Mr. Tanner after the 14th, correct?

A. After the 14th of—

Q. November.

A. Several times.

Q. And at the time you spoke to Mr. Tanner, you weren't sure what the effect of the stay was, correct?

THE COURT: We've been through that three times, counsel.

MR. STEPANIAN: I thought it was—all right.

THE COURT: The motion says what the position is. It says exactly that.

MR. STEPANIAN: Q. After that, that same day you went to speak to Mr. Pogue, is that correct?

[116] A. When I came back from Watsonville, I went and found Otis.

Q. And you said to him in those terms, Otis, the motion was granted?

A. Something along those lines.

Q. And he said, find, [*sic*] or good, or something of that nature, right?

A. I'm sure he did.

Q. When did you know that there was a civil warrant or civil writ of execution outstanding?

A. I knew that—I don't know. Maybe a month earlier. Did you want me to finish that?

Q. Sure.

A. One was originally issued and apparently there is some kind of timing as opposed to them. I was under the impression through information I got, I think, from the civil people in the Sheriff's department that it had expired, that it had never been served and they had to get a second one.

Q. Were you inquiring as to organizing the probation search in this writ of execution for these matters to be done at the same time? Were you attempting to correlate these two situations?

A. I wasn't overly concerned with the simple writ. However, my understanding of what the execution was is that it specifically named the guns that I anticipated that we would

[117] THE COURT: So the writ of execution did specify certain weapons?

THE WITNESS: Yes. Specified a gun collection.

MR. STEPANIAN: As far as you were concerned, possession of guns violated the terms of probation?

THE WITNESS: Precisely. Could not own guns.

Q. Did you have communications with the civil lawyer from Mr. Collins?

A. Not in that near time period, no.

Q. When was the last time you spoke with him when you say near the time period?

A. I think I had a co ple of discussions with the civil attorney. But if I remember correctly, when the misdemeanor case was either about to go to trial or somewhere around the original sentencing.

Q. Did you have any conversation with Mrs. Williams and/or Mrs. Collins about the progress of the case?

A. When?

Q. After November 14th?

A. Yes.

Q. They were interested in what was happening, is that correct?

A. Yes.

Q. During the conversation that you had about the progress of the case, was this the time that you went up [118] with Mr. Shipp?

A. I think we discussed the progress of the case with Mrs. Collins then. I also discussed it with her after the sentencing.

Q. Did you have any information when you went up there from any informant, whether it was a citizen informant or a police officer, about marijuana and/or drugs when you went up there with Mr. Shipp?

A. The first time I went up there with Sgt. Shipp?

Q. No. When you went up with Sgt. Shipp and he went to look for some plants, did you have a discussion

about plants or marijuana or drugs when you went up there?

THE COURT: You asked that before.

MR. STEPANIAN: I found the reference to it.

THE COURT: Okay.

THE WITNESS: Did I have a discussion with Sgt. Shipp about the information I had received?

MR. STEPANIAN: Q. Did you have any information from private citizens, citizen informants, police officers, concerning marijuana and/or drugs on that property prior to you going up there with Narcotic Officer Shipp?

A. How much prior?

Q. Did you have any knowledge when you went up there?

A. Other than what Pogue had told me, no.

Q. So the answer to your question is Pogue had told [119] you about narcotics or marijuana, is that correct?

A. No.

Q. Who told you?

A. Otis indicated to me that he had gotten a call from the Collins' about that marijuana plant.

Q. Fine.

Let me refer you, please, to page 210.

This is fairly important, your Honor. It is not spectacular, but I just want to get this cleared up.

Would you please refer to page 210 between 8 and 20.

A. Yes.

Q. Do you remember testifying to that, about any information that you received?

A. Yes.

Q. Well, did you receive any information concerning marijuana?

MR. PENROSE: Objection. She's just testified and answered that question.

THE COURT: There is some inconsistency.

Read it.

MR. STEPANIAN: Q. "Do you have any information from any informant concerning whether or not there was narcotics on the premises prior to going out there on the 3rd of March?

"A. No.

"Q. How about from any other police officers?

"A. No.

"Q. Private citizens including citizen informants?

"A. I had no information about narcotics.

"Q. That's marijuana and drugs, too?

"A. I had no information."

Now, you met with the police officers prior to going up to the house on the 3rd of March, correct?

A. Yeah.

Q. You received the reinstatement of probation by the judge on the 27th, is that right?

A. Yes.

Q. Do you recall what day that was?

A. Thursday or Friday. I think it was a Friday.

Q. It is a fact, is it not, that there was some manpower problem on Friday and in the course of that weekend in the Santa Clara County Sheriff's Department?

A. I don't think the manpower problem arose until the Monday. There was a homicide over the weekend. I think the body was found on Sunday night.

Q. Fine.

There was a manpower problem on Monday and Tuesday, isn't that correct?

A. Within our office, yes.

Q. And then when did the search take place?

A. The 3rd, which I assume was a Tuesday.

Q. How many police officers do you recall going up there?

A. Seven or eight, maybe.

Q. Lots of them, right?
A. Uh-huh.
Q. Who did you go with?
A. Whose car?
Q. Yes.
A. Lt. Griffin.
Q. Was there anybody else in that vehicle?
A. Probably Sgt. Shipp.
Q. You went into that residence during the course of that search, correct?
A. Correct.
Q. You had conversation with Mr. Sam Foster on the telephone prior to the search, is that right?
A. Yeah.
Q. You had conversations with Judge Marlowe also, is that correct?
A. I had one conversation with Judge Marlow.
Q. Mr. Foster indicated to you, did he not, that there was a notice that was given to David Merchant concerning the reinstatement of probation on the 27th?
[122] A. That's what he said at one point.
Q. And he was sort of excited and sort of, how would you say it, frantic on the telephone in regards to that?
MR. PENROSE: I object.
MR. STEPANIAN: Q. How would you characterize his tone?
MR. PENROSE: May I renew my objection, your Honor?
THE COURT: Overruled.
MR. STEPANIAN: Q. How?
A. Got increasingly more excited throughout the conversation.

CROSS-EXAMINATION

By Ms. Roscoe:

Q. Mrs. Bazar, do you recall examining the civil writ on, the civil writ you used as one of the bases for going into the residence on Highland, on March 3rd?

A. I remember seeing a copy of it.

Q. Did you examine it?

A. I read it.

Q. It's correct, is it not, that there was no affidavit accompanying it?

A. I don't remember.

Q. Is it not also correct that it was not seen by a magistrate authorizing entry?

[123] A. I don't remember.

THE COURT: You talking about the civil writ of execution?

MS. ROSCOE: Yes, your Honor.

Q. Isn't it a fact that the civil writ did not specify a gun collection, it just specified guns?

MR. PENROSE: Objection, your Honor. The document speaks for itself.

THE COURT: Is it a document in evidence?

MS. ROSCOE: It's our Exhibit B, your Honor.

THE COURT: What does it say?

MS. ROSCOE: I think it says guns. I have been unable to find my copy.

MR. PENROSE: Your Honor, this is not the complete writ. It is an exhibit. So I can't answer your question.

MS. ROSCOE: All right.

Q. At any rate, it is your testimony that you had no memory of ever examining the writ to ascertain whether or not it was signed by a magistrate?

THE COURT: Does the county counsel advise the sheriff on matters of execution?

A. Yes, they do.

THE COURT: They seek legal advice?

THE WITNESS: No.

MS. ROSCOE: Q. When did you first find out about [124] the writ?

[125] A. I had known of the existence of the writ, or I had been told of the existence of the writ, for maybe a month prior.

Q. Did you discuss it with Mrs. Collins?

A. I don't believe I ever discussed it directly with her, no.

Q. When you were up at her house the day that you went up to examine the marijuana plant, what was the nature of your conversation?

A. Marijuana, the problem with the gunshots going off in the area.

Q. She said she heard them?

A. Frequently.

I asked her if there was any particular time of day. She specified during the day as well as at night.

Q. Did she ever say that she saw anybody with the gun?

A. She told me that she had seen Mr. Merchant with the gun in the past.

Q. Did she say when in the past?

MR. STEPANIAN: I would object on behalf of Mr. Merchant. I am representing him. I feel that that question is outside the scope.

THE COURT: She's cross-examining.

MR. STEPANIAN: It is my client. I would move that [125] answer be stricken.

MR. PENROSE: I don't think because Mr. Stepanian—

THE COURT: Overruled.

MS. ROSCOE: Q. Did you go up to the Collins' house or in the area of the Highland premises?

MR. PENROSE: I object. There is a question on the record, we haven't answered.

THE WITNESS: I don't remember what the question was.

MS. ROSCOE: I will withdraw the question.

Q. Did you go up with officer Pogue to investigate sign?

A. That was one time I went up there.

Q. Was that the first time in the middle of January?

A. No. It was prior to the sentencing.

Q. Then when did you go up there to investigate marijuana?

A. That was around the middle of January.

Q. And two times to San Jose Road?

THE COURT: That's what she said.

THE WITNESS: I believe it was two, yes.

MS. ROSCOE: Q. When you were at the Highland house on March 3rd, did you assist with the search warrant?

THE COURT: Which search warrant are you talking about?

[126] MS. ROSCOE: The telephone search warrant dated March 3rd.

THE WITNESS: I was the one who contacted the district attorney's office and spoke to John Hawkins.

MS. ROSCOE: Q. Do you know what time you called in?

A. I thought I got ahold of him first probably between 1:30 and 2:00.

Q. Did you talk to any magistrate other than Judge Marlowe?

A. I don't believe I ever talked directly to Judge Kessel, no.

Q. You did talk to Judge Marlowe?

A. When I returned his call from the Merchant home.

Q. In your discussion with Judge Marlowe, did you discuss or mention the civil writ?

A. I don't remember. I don't think so.

Q. Do you recall whether or not he was aware there was a civil writ?

A. I didn't know if he was or not.

Q. Did you discuss a civil writ with Sam Foster?

MR. PENROSE: I object to the relevancy of this. Lack of relevance.

THE COURT: Sustained.

MS. ROSCOE: Thank you.

[127] MR. PENROSE: Your Honor, I have a very brief redirect.

May I show counsel a document before I profer it to the witness?

THE COURT: Yes.

MR. PENROSE: May I approach the witness?

THE COURT: You may.

MR. PENROSE: May the record reflect I am handing the witness two documents marked respectfully G-2-A and G-2-B.

REDIRECT EXAMINATION

By Mr. Penrose:

Q. Mrs. Bazar, what are those documents now that you have looked at them?

A. This is—

Q. This being G-2-A.

A. Page G-2-B is the form the clerks office fills out. It is a confinement form. It has to do with the sentence and when and if they are to start any sentence.

MR. STEPANIAN: I would ask that that be stricken as the document speaks for itself.

THE COURT: I don't have a copy.

MR. STEPANIAN: I think those are court records.

MS. ROSCOE: I think it is our exhibit H.

THE COURT: Looks like an IRS form to me. Okay. This date was November 14th. People of the state [128] of California vs. David Merchant. Number of case 417PC and 417BPC.

MR. PENROSE: Those are the charges.

THE COURT: Appeal on second count filed in open court. Attorney Foster present. Okay.

MR. PENROSE: Your Honor, for the record, I think what you are—

THE COURT: 18 months. 12 months suspended. Stay of execution granted until 12-13-80. Okay.

What's your question?

MR. PENROSE: My question concerning G-2-B, which the witness now has, is is that the formal sentencing document from the November 14th sentencing.

MR. STEPANIAN: I would object to that.

THE COURT: I will take judicial notice it is.

MR. STEPANIAN: That it is, your Honor?

THE COURT: Yes.

MS. ROSCOE: I think the court fills this form out after every hearing to indicate what happened.

THE COURT: It is a court record.

MR. PENROSE: I think the record would reflect this is a certified copy with the seal of the court.

THE COURT: This next one is G-2-A, which is entitled "conditions of probation."

"Imposition of sentence suspended for a period [129] three years. Probation granted under the supervision of probation office for three years. Confinement to the county jail—six months. Stay of execution granted to 12-13-80. Other conditions of probation: not to possess any firearms during period of probation."

Okay.

MR. PENROSE: Your Honor, I think the record should reflect that G-2-A also is a certified copy from the clerk of the court.

Q. Mrs. Bazar, with respect to G-2-A, the document that has the signature of the defendant at the bottom, or what purports to be the signature of the defendant, were you in court to see whether or not that document was signed?

A. Yes.

Q. Did you see the defendant sign it?

A. Yes.

Q. Can you tell us at what stage of the proceedings it was when the defendant signed it? When I say at what stage, at what stage was it with respect to the discussion on the record concerning the stay and–

A. It was at the very end. This is always the last thing. The judge is beginning to go off the bench. It was right at the point when I realized that I hadn't asked for a [130] formal order to have the weapons destroyed. The clerk, if I remember it correctly, had just handed him the form to sign and I asked for a formal order for the weapons to be destroyed. It distracted Mr. Merchant for a minute, because I believe he said something as to them being destroyed.

Q. Then he signed them?

A. Then he signed it and handed it back to the clerk.

Q. Is that after the colloquy on the record about the stay?

A. Yes.

MR. PENROSE: Nothing further.

RECROSS-EXAMINATION

By Mr. Stepanian:

Q. When you were talking in terms of destroying weapons–

May I approach the witness?

THE COURT: Yes.

MR. STEPANIAN: Q. Who wrote this order for weapons to be destroyed?

A. I would assume that the clerk wrote that.

Q. This document is what the clerk of the court looks at? That's G-2-B.

A. The clerk does both of them.

Q. This is in the possession of the clerk?

A. They both are up until the point where she hands [131] it to him to be signed.

Q. But this is in the court file, though, isn't that correct? These are both in the court file?

A. They're both in the court file.

Q. This one is not signed by the—

A. This one remains, as far as I know, with the court file. A copy of this is given to the defendant and the original remains in the file.

Q. You had communications with Mrs. Williams and also Mrs. Collins, isn't that correct?

A. Yes.

Q. They're friends, is that right, is it fair to say?

A. I don't know.

Q. Did you ever talk to them together?

A. No.

Q. Did you talk to them at any time before the sentencing?

A. Yes.

Q. Mrs. Collins before the sentencing?

A. Yes.

Q. Mrs. Williams before the sentencing?

A. I believe so.

Q. They made some complaints concerning weapons, gunshots?

A. Prior to sentencing?

[132] Q. Yes.

A. Yeah.

Q. Did you personally receive information about Mr. Merchant being seen with a weapon or did you receive that from some other police officer?

A. I had at various times received it both from police officers and from individuals who lived in the area.

Q. I am talking about this—

A. Specifically what I testified to.

Q. Yes. Who did you receive that information from?

A. Mrs. Collins.

Q. When was that, please?

A. She told me about it when we went up there to look at the marijuana plant.

Q. There was no marijuana plant?

A. No.

Q. Who was present when she said that to you?

A. She and I.

Q. And when was that date, please?

A. Some time in the middle of January.

Q. When did she say she saw this weapon or this gun in Mr. Merchant's hand? When did she say that?

A. I don't think she gave me an exact date.

MR. STEPANIAN: I'd ask that that be stricken as no foundation.

[133] THE COURT: Okay, denied.

Anything else?

MR. PENROSE: Nothing further.

Your honor, as I understand it, counsel may wish to recall Mrs. Bazar and, therefore, we are going to take the next witness out of order to lay the foundation.

THE COURT: All right.

ROBERT WILLIAM SHIPP,

Called as a witness on behalf of the government, being first duly sworn, testified as follows:

THE CLERK: State your full name and spell your last name.

THE WITNESS: My name is Robert William Shipp, S-H-I-P-P.

THE COURT: Mr. Stepanian, you have had the officer on the stand before?

MR. STEPANIAN: Yes.

THE COURT: How would it speed up the process?

MR. STEPANIAN: This was the longest officer. This officer will take until 4 o'clock.

THE COURT: Did you hear my suggestion? My suggestion is that Mr. Penrose make an offer of proof. Then you accept it or cross-examine him on it.

MR. STEPANIAN: Let's do it. He has testified before. [134] THE COURT: Is that all right with you, Mr. Penrose?

MR. PENROSE: Yes, your honor.

Your Honor, Sgt. Shipp will testify that he was a member of the search team, that he entered the house after a period of time, awaiting the telephone calls to be completed. The search began. Mr. Merchant said to him that all the guns are in two locations. That Sgt. Shipp went upstairs with—one of the locations upstairs. He went upstairs with Deputy Ruiz.

THE COURT: Did Mr. Merchant say upstairs?

MR. PENROSE: He said two locations.

THE COURT: Do you recall where he said they were?

THE WITNESS: He didn't mention any locations. He just said two places.

MR. PENROSE: Miss Marohn accompanied Sgt. Shipp and Deputy Ruiz upstairs and she said all the second floor guns are in that room. She indicated a room adjacent to the bedroom where they could see there were a large number of guns propped up against the wall and along the wall. As Sgt. Shipp was proceeding toward these guns that he was pointed to, he looked over to the side by the bedroom, and specifically about the headstand of the bed, and saw a .45 automatic, and he mentioned that, and Mrs. Marohn said, oh, I forgot that one.

He then went over toward that gun and saw a second [135] handgun on the floor close by the area where the .45 was originally seen, and he picked that up and motioned to Deputy Ruiz, and Deputy Ruiz then opened the top drawer of the nightstand and there was a second revolver in that drawer.

At some point in this unfolding sequence of events, Mr. Merchant came upstairs into the bedroom looking for his spectacles, and he found his spectacles by that bed were those guns were found and took them and went elsewhere.

Mrs. Marohn asked for some money from a drawer that

was in the bedstand that the second revolver had been retrieved from and she was allowed to take that money. Sgt. Shipp then called the civil deputies upstairs to begin to catalog the guns for the purpose of the levy. And they came up and were put basically in command of those guns.

The search proceeded then without taking into account Mrs. Marohn's statements that all the second floor guns were in one pile. They felt they had to ascertain that for themselves.

They in the course of that found a large quantity of cash in a dresser drawer in that bedroom.

THE COURT: Same testimony by Officer Kirkland, right?

MR. PENROSE: I believe that largely overlaps.

Sgt. Shipp would also testify to the description of the barn built on the slope. There were two levels.

[136] Sgt. Shipp would then testify that he came back downstairs and was thinking to himself that he had basically approached close to the completion of the search and then he noticed under the stairwell covering the stairway that was closed. And it looked to him like a storage area. And he said to himself, "I wonder what would be in there. Looks like a storage area." Following my notes here. Sgt. Shipp then said there has to be a storage area under these stairs. Ms. Marohn who was nearby at that point, said there are no weapons in there. That is just a storage area.

Sgt. Shipp says, "I believe you, Cleo, but I have to look, that is my job." Mrs. Marohn repeated it was just a storage area.

Sgt. Shipp then moved around looking for an opening in this area and came across a door that was held on by bent nails. He straightened out one of the nails and then saw a staircase leading not down to a storage area but to a basement.

He had a flashlight. He began panning with the flashlight and saw what appeared to be chemical containers.

Specifically ether containers.

I believe just before he was panning, or as he was panning, Miss Bazar called down there, "Can Cleo leave?" A second later there was this panning and he said, "No, hold up Cleo."

Sgt. Shipp would also testify to the the time when [137] the suitcase full of qualudes was discovered and opened. And he would testify that his occurred close to the end of the initial search before they froze the place, and it definitely occurred after the bedside guns had been discovered and after they were finding guns in small containers.

THE COURT: After they found the basement storage or before?

MR. PENROSE: I don't know the answer.

THE COURT: Do you recall?

THE WITNESS: Yes, sir. It was during my examination of the basement that the qualudes were found upstairs. When I returned upstairs to advise Lt. Kirkland, they were bringing down the qualudes.

THE COURT: So you didn't find the qualudes yourself?

THE WITNESS: No, I did not.

MR. PENROSE: That basically covers it.

THE COURT: Okay. Mr. Stepanian.

CROSS-EXAMINATION

By Mr. Stepanian:

Q. You had an occasion to go up and around the Merchant residence and Collins residence about two or three weeks prior to March 3rd, is that correct?

A. That's correct.

Q. And you had been up there with Mrs. Patty Bazar?

[138] A. That is correct.

Q. You went up with her and some other officer?

A. That is correct.

Q. When you went up there, she had given you information that she had learned from the Collins' that there was some potential marijuana plants there, is that correct?

A. She advised me that she had received a complaint from them and she would like me to come up and confirm it.

THE COURT: You are with the sheriff's office?

THE WITNESS: Yes. Narcotics section.

MR. STEPANIAN: Q. So you went up there and there was no marijuana growing outside the area that was pointed out?

A. That is true.

Q. Okay. Going down to the entrance into the basement area or storage area.

A. Basement.

Q. There was some foam rubber or some sort of mattress material in front of the door that you had to open to go in, do you recall that?

A. You mean up against the door itself?

Q. Yes.

A. I do not recall. I could see the door easy. I did not have to pull anything away to see that there was a doorway. I don't know—the whole place was with junk. I had to climb over rugs and lots of stuff.

[139] Q. There's machines. There's big machines in that place, right?

A. Right.

Q. There's lathe, huge lathes?

A. Yes.

Q. There is an antique lathe as big and as tall as this courtroom, is that correct?

A. Probably as long as that desk area and probably as tall as it is long.

Q. It is a huge commercial lathe?

A. Yes.
Q. There is big electric saws, lots of tools?
A. Correct.
Q. Engine parts?
A. Correct.
Q. Ratchets, big sort of cases full of tools?
A. Correct.
Q. On the walls, all over the place?
A. True.
Q. There is all kinds of machinery in various process of repair and disrepair, is that correct?
A. There is all kinds of stuff all over.
Q. Big machines, little machines, that kind of thing?
A. Yes.
Q. The house is sort of in semi-poor condition?
[140] A. Poor condition.
Q. Refurbishing. There were certain places that were in the process of being repaired, is that correct?
A. I don't know if they're being repaired or not. They were not in finished condition.
Q. Now, that doors that you went down to, you brought your flashlight, there were bent nails on the wall?
A. On one side.
Q. You had to bend those nails to get in?
A. You would just take the bent nail and twist it sideways and it would come down.
Q. How many of them did you do?
A. Specifically, I remember the top one. I don't remember if there was one on the bottom or not.
Q. Now, we are going to the barn area.
Did you have occasion to go into the barn?
A. Which date?
Q. On March 3rd.
A. I had occasion to go in both areas.
Q. There is an upstairs and a lower level?
A. Yes.

Q. On the upstairs level there was motorcycles?

A. In the upstairs part of the barn there was, yes, a broken down motorcycle.

Q. How many of them?

[142] Q. Did you open the door?

A. Had a lock on it.

Q. Which portion of the barn are you talking about?

A. Talking about strictly the upper part.

Q. Pardon me?

A. Talking about stricly the upper part. Second level.

Q. There is kind of a rickety ramp, is that correct?

A. Yes.

Q. That goes over a little gully?

A. That's true.

Q. And into the upper portion of the barn?

A. That's correct.

Q. You say there was a padlock on the upper part?

A. Yes, Sir.

Q. How did you get it open?

A. I cut if off. I was at least there when it was cut.

Q. By that time, Mr. Merchant had left?

A. Mr. Merchant had been arrested and transported to jail.

Q. Do you recall approximately what time a chemist came to the place—criminologist?

A. Some time around 12 or 1 o'clock, to the best of my knowledge.

[143] Q. Would it refresh your recollection to say it was 2:55?

A. Criminologist?

Q. Yes.

A. If that's the case, I don't know. I thought it was closer to 1 o'clock.

CROSS-EXAMINATION

By Ms. Roscoe:

Q. Sgt. Shipp, when you went down to the basement, that is, when you observed containers of ether—

A. Yes?

Q. On that observation, you called upstairs and had Cleo Marohn stopped from leaving the premises?

A. Yes.

Q. And did you do that because you saw the ether?

A. Yes.

Q. And that made you suspicious of her?

A. She was what I believed to be a co-habitant of the residence and my observations of what was downstairs led me to believe possibly there was evidence to believe that they were in the process of making illegal drugs.

Q. So you detained her on that basis?

A. Yes, Ma'am, I did.

Q. Just prior to your going down there, or when you were part way down there, somebody asked you for permission [144] for her to leave because she had a doctor's appointment?

A. That's right.

Q. Do you know who it was who asked your permission?

A. I am not sure. I believe it was Miss Patty Bazar.

Q. At that point, you said okay?

A. I advised we had no reason not to let her go.

Q. How long did you stay down in the basement?

A. I would say less than three minutes.

Q. You mean you just flashlighted the containers and then went back up?

A. I walked about three-quarters of the way down. I was still on the stairway. With my flashlight, I panned the basement area. The containers were labeled ether. Some of them were.

Q. How big an area is that?

A. Maybe almost the size of this room. Maybe three-quarters the size of this room. Maybe two-thirds.

THE COURT: This room is what, 20 by 40?

THE WITNESS: Probably from the end of this desk and out to that wall and almost as wide.

THE COURT: 30 by 30?

MR. PENROSE: I was going to say 30 by 30.

MS. ROSCOE: Q. At any rate, from the staircase that you were on you could shine your light into the room and see containers labeled ether, is that your testimony?

[145] A. Yes.

Q. And then you turned around and you went back upstairs?

A. Yes.

Q. And then you went back down there later on?

A. Oh, yes.

Also, if I may clarify, when I went down that stair I might have stepped down and looked to make sure what it was. I didn't totally spend all my time on the steps. I wasn't very long. As soon as I saw it, I came back upstairs.

Q. Before you pushed the bent nails aside to gain entry down to the stairway, you mentioned to Cleo that that looks like a storage area and she said to you there are no weapons down there, is that correct?

A. Best of my recollection, yes.

Q. And they said it was just a storage area?

A. Yes.

Q. And did you find any weapons down there?

A. No.

Q. Did you ask her how to undo the barricade so you could get down?

A. No.

Q. But you did observe that there was something down there and she said yes, it was a storage area?

MR. PENROSE: Objection. Asked and answered.

[146] THE COURT: Sustained.

MS. ROSCOE: Q. When you went upstairs, would it be your testimony, according to the offer of proof, that Cleo stated all the guns on the second floor were in one room?

A. Probably more correctly would be that they're all in there. That's all the guns. I don't think she made reference to the second floor. Just the fact all the guns are in there.

THE COURT: You were on the second floor and she pointed to a room?

THE WITNESS: Yes.

MS. ROSCOE: Q. And in that room there were 50 or more rifles?

A. Approximately. Somewhere around 50 rifles, and other weapons.

Q. And handguns as well?

A. Yes.

Q. So the bulk of the weapons were in that room?

A. Yes.

Q. And then later you found one on the floor next to the bed?

A. I found two there.

Q. And you pointed that out to her?

A. I said, "What about this?" she said, "I forget. He keeps a gun there" or something to the effect.

[147] MS. ROSCOE: Thank you.

REDIRECT EXAMINATION

By Mr. Penrose:

Q. In response to a question that Judge Williams asked you, you said you cut the lock off.

A. I believe there present [*sic*] at the cutting of the lock.

Q. Was it that cutting of the lock on the barn before or after the approval of the telephone warrant?

A. It was after the warrant.

Q. Do you know of anybody who searched the barn before the telephone warrant?

A. Second floor?

Q. Right.

A. No one searched the second floor before the warrant.

Q. What do you know concerning a search of the first floor?

A. Most likely, people were in and out of the bottom part. They could have been.

Q. You say most likely. Do you have any knowledge?

A. I have no knowledge. I just know it wasn't a restricted area and we were looking for a tank at the time.

MR. STEPANIAN: I would ask that that be stricken.

THE COURT: Overruled.

MR. PENROSE: It is part of the background of the case.

[148] Q. You were looking for a particular vehicle?

A. Yes.

MR. PENROSE: Thank you, I have nothing further.

THE COURT: That's all. Thank you.

MR. PENROSE: That does complete the government's case.

MR. STEPANIAN: Our witness, your Honor, in this matter is Kathy Kelley.

THE COURT: Miss Kathy Kelley, would you come forward, please.

* * * * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CRUZ

No. 296

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF/RESPONDENT,

v.

WILLIAM DAVIDSON MERCHANT III,
DEFENDANT/APPELLANT.

OPINION

This is an appeal from a judgment imposed after revocation of probation.

The following facts are undisputed:

1. On November 14, 1980, after a jury had found defendant guilty of violations of Sections 417 and 417(b) of the Penal Code, the trial court placed him on three years' formal probation on condition, among others, that he serve six months in the county jail for violation of Section 417 and twelve months, suspended, for violation of Section 417(b). At that point in the proceedings, defense counsel filed a Notice of Appeal whereupon the judge stated "the sentence [!] will be stayed pending your appeal". Defendant then signed probation terms.

2. The Probation Department did not assign an officer to this case.

3. On February 11, 1981, the People brought a Motion for Clarification and/or Modification of Stay of Judgment. The Petition recited that:

> "The stay order issued in this case . . . is not clear as to whether or not the probation was stayed along with the rest of the judgment.

4. At the hearing upon the motion, defendant was not present but was represented by counsel. The court stated:

> "The court will grant the motion for clarification. Defendant will be reinstated on the terms of probation."

5. Defense counsel did not inform defendant of the hearing or its outcome.

6. On March 3, 1981, a probation search of defendant's residence was conducted and guns, whose possession constituted a violation of probation, were found. The trial court thereafter revoked probation and sentenced defendant to 18 months in jail. This appeal followed.

If the District Attorney and the Probation Department were uncertain as to whether only the jail sentence or the entire judgment was stayed pending appeal, the defendant cannot be faulted for being similarly confused. Due process and elementary considerations of fairness preclude the revocation of probation and imposition of a jail sentence unless the defendant had theretofore being unequivocally apprised of his probation status. In view of our holding on this point, we need not address other issued raised by defendant.

We do not in any respect disagree with the decision of the United States District Court for the Northern District of California in CR No. 81-0109 SW(SJ), dated October 28, 1981, which held that the trial court intended to impose probation effective November 14, 1980 and that, in any event, the probation search was lawful.

The order revoking probation is reversed and the trial court is directed to readmit the defendant to probation.

Dated: Nov. 17, 1981.

[signature illegible]

Brauer, P.J.

I concur.

[signature illegible]

May, J.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. CR-81-109-SW (SJ)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

WILLIAM DAVIDSON MERCHANT, CLEO MAROHN,
DEFENDANTS.

DECLARATION OF CRISTINA C. ARGUEDAS IN SUPPORT OF MOTION FOR RECONSIDERATION

I, Cristina C. Arguedas do declare:

1. I represent Defendant Marohn in the above entitled matter.

2. I have discussed the probation procedures with Robert Hawsley of the Santa Cruz Probation Department, and I have reviewed the papers filed in connection with Defendant Merchant's Municipal Court probation revocation in Santa Cruz. In doing so I received the following information:

a. When a Municipal Court Judge sentences a defendant to a term of probation, the Court sends a notice to the Probation Department informing them of that fact.

b. Upon receipt of such notice, the Probation Department assigns an officer to supervise the probationer.

c. If the probationer fails to report to the probation office, the probation department petitions the court to revoke probation in the case.

d. David Merchant never reported to probation after the November 14, 1980 sentencing hearing, and the Probation Department never petitioned for a revocation of probation prior to the March 3, 1981 search.

e. In the Merchant case, the Santa Cruz Probation Department filed a supplemental report to the court dated April 21, 1981 stating that "Probation supervision was not provided pending the appeal outcome."

The foregoing is true and correct to the best of my knowledge.

Dated: September 3, 1982

Respectfully submitted,

/s/ CRISTINA C. ARGUEDAS

Cristina C. Arguedas

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. CR-81-109-SW (SJ)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

WILLIAM D. MERCHANT, AND CLEO L. MAROHN,
DEFENDANTS.

STIPULATION OF FACTS BETWEEN DEFENDANT MERCHANT AND UNITED STATES

WILLIAM DAVIDSON MERCHANT, also known as William Davidson Merchant, III, defendant herein, after having discussed the matter with his attorney and being satisfied with the legal advice received, hereby agrees to submit the issue of the appropriate verdict on Count I in this matter to the Court on the basis of the fact stipulation set forth below. Defendant William D. Merchant further agrees to waive the following rights in submitting the case by fact stipulation:

1. The defendant waives his right to public trial by a jury of twelve persons selected in accordance with the applicable procedures of the United States District Court for the Northern District of California;

2. The defendant waives his right to require that any adverse verdict be unanimous among the jurors;

3. The defendant waives his right to confront and cross-examine the government witnesses;

4. The defendant waives his right to call witnesses on his own behalf;

5. The defendant represents that no promises have been made to him in exchange for the above captioned waivers except that after a verdict is rendered in this matter the United States will move to dismiss Counts II and III against him. Defendant specifically represents that he makes these waivers freely and voluntarily and after consultation with his attorney.

6. Defendant further stipulates that his true name is William Davidson Merchant, III, and that he is the same person named in the above captioned indictment.

7. Defendant further stipulates that the statements set forth below could be established as fact at his trial and that the Court is authorized by him to accept these statements as facts established beyond a reasonable doubt:

a. On March 3, 1981, officials from the Santa Cruz County Sheriff's office began a search of the residence of defendant Merchant (and the barn adjacent thereto) at 25977 Highland Way, Los Gatos, California.

b. All physical evidence referred to below was directly derived from this March 3, 1981, search. This search was made under the circumstances described in suppression hearings and probation violation hearings held before U.S. District Judge Spencer Williams and California Municipal Court Judge John A. Marlo, respectively, and is further described in exhibits attached to pleadings filed by the parties in this case in support of and in opposition to the suppression motions.

c. Defendant Merchant was present at 25977 Highland Way, Los Gatos, California (hereinafter "Highland"), prior to and at the beginning of the March 3, 1981, search. At all relevant times, the Highland property was owned by defendant Merchant's parents, and he was the authorized occupant of those premises.

d. All chemicals, chemical containers, laboratory equipment and documents relevant to Count I referred to below were provided through competent chains of custody

to Drug Enforcement Administration chemist Lionel Tucker, who participated in the examinations and analyses set forth in the report of April 15, 1981, which is attached hereto as Exhibit a [*sic*] "A".

e. Lionel Tucker, upon being called by the government, would testify to qualifications which properly would satisfy the Court that he was competent to render expert opinions and conclusions as to the purposes to which the documents, chemicals and equipment had been gathered at the Highland property. Mr. Tucker would testify that in his opinion these materials were gathered at Highland Way for the purpose set forth at page five of this report, to wit: to produce "phencyclidine (PCP) and its immediate precursor, 1—piperdinocyclohexane carbonitrile (PCC)." Mr. Tucker's testimony would completely cover the statements set forth in the attached report, which is incorporated into this stipulation by reference. The apparatus diagrams, chemical procedure outlines and invoices which are attachments to and part of Exhibit "A" were seized during the search which commenced on March 3, 1981.

f. With respect to the address of Blue Frog Enterprises, Box A, Holy City, California, which appears on certain invoices in Exhibit "A", a representative of the California Department of Motor Vehicles would testify that William Davidson Merchant, III, gave that same address on about August 14, 1979, as part of his application for renewal of his California driver's license.

g. A representative of the San Jose Police Department would testify that defendant Merchant was issued a citation on approximately March 9, 1978. This representative would further testify that on that date Mr. Merchant gave his address as Box A, Holy City, California.

h. United States currency in the amount of at least $313,205 was seized on the premises at Highland Way in the search which commenced on March 3, 1981. Attached

hereto as Exhibit "B", is the report of the Santa Cruz Sheriff's Office itemizing the materials seized in the search which commenced on March 3, 1981. Representatives of the Sheriff's office would testify that each of these items was so seized in the locations specified.

8. Count I of the Indictment is amended to read "Schedule III" where it presently reads "Schedule II".

DATED: March 17, 1983

/s/ WILLIAM DAVIDSON MERCHANT, III
William Davidson Merchant, III
Defendant

/s/ JOHN F. PENROSE
John F. Penrose
Assistant United States Attorney

/s/ PENELOPE S. COOPER
Penelope M. Cooper
Counsel for Defendant Merchant

APPROVED:

/s/ SPENCER WILLIAMS
Spencer Williams
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. CR-81-0109-SW (SJ)

Violation of Title 21 U.S.C. Sections 841(a)(1) and 841(b)(1)(B)(5)—Manufacturing of Phencyclidine.

UNITED STATES OF AMERICA, PLAINTIFF,

v.

WILLIAM D. MERCHANT, DEFENDANT.

JUDGMENT AND PROBATION COMMITMENT ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause of the contrary was shown or appeared to the court the court adjudged the defendant guilty as charged and convicted as ordered. The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years; that a special period of parole of seven (7) years is imposed; that the defendant shall pay a fine in the sum of twenty-five thousand dollars ($25,000.00) to the use of the United States of America.

IT IS FURTHER ORDERED that the original Indictment and all remaining counts of the Superseding Indictment as to defendant herein be and are hereby dismissed.

IT IS FURTHER ORDERED that execution of sentence herein is hereby stayed until further order of the Court.

/s/ SPENCER WILLIAMS

May 20, 1983

In the Supreme Court of the United States

No. 85-1672

UNITED STATES, PETITIONER

v.

WILLIAM D. MERCHANT

ORDER ALLOWING CERTIORARI. Filed June 30, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20527